Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09179/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2018	**On 16 March 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

B M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Harding, Counsel, instructed by A Seelhoff Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision posted on 4 October 2017 Judge Parker of the First-tier Tribunal (FtT) dismissed the appeal of the appellant, a citizen of Bangladesh, against the decision of the respondent made on 27 October 2015 refusing to grant international protection. The judge found that the appellant had not given a credible account of being kidnapped and raped by a neighbour called [A] who was a member of the Awami League and a known criminal. Her allegations included a claim that in January 2014, on

the second occasion this man and his associates kidnapped her, she was raped and physically abused several times.

2. The grounds of appeal were twofold. It was contended that the judge erred in law firstly by conducting the hearing in a procedurally unfair manner giving rise to the appearance of bias and secondly by failure to have regard to relevant evidence, in particular the appellant's witness statement.

3. I heard evidence from Mr Adam Seelhoff, the principal of the solicitors' firm who represented the appellant at the hearing. He was asked questions about his witness statement in which he reported that the judge questioned the appellant in significantly greater detail than the Home Office Presenting Officer and for approximately twice as long and only ceased her questioning of the appellant when he pointed this out to her. Mr Seelhoff had a particular concern about the judge's response to an intervention by him at one point, she suggesting that his client (who was using an interpreter) could not understand a question. The judge was reported to have remarked "That's one interpretation."

4. In his oral testimony Mr Seelhoff said he formed the impression early on that the judge did not believe the appellant. He also considered that the judge's lengthy questioning of the appellant regarding the legal proceedings in Bangladesh over her marital status did not take account of the legal complexity of the issue. It was not just the volume of questions asked by the judge (9 as opposed to 8 asked by the HOPO), it was the judge's apparent disregard of the sensitivity of some of the issues arising in the case.

5. Prior to the hearing the Upper Tribunal obtained from Judge Parker a statement from her giving her account of the proceedings in light of the criticism raised in the grounds. At the hearing Mr Clarke produced the Note made of the hearing by the HOPO.

6. I heard helpful submissions from Mr Harding and Mr Clarke. Mr Harding highlighted the point that the judge did not consider whether the appellant was a vulnerable witness. It was not suggested the judge was biased, only that the manner in which she conducted the hearing gave rise to an appearance of bias. Mr Clarke submitted that the judge's questions were clearly designed to give the appellant an opportunity to explain difficulties in her account and none were inappropriate. There were numerous inconsistencies in the appellant's account. The judge clearly had taken account of the appellant's witness statement. Mr Clarke pointed out that the grounds had not raised the **Tanveer Ahmed** point.

7. Having considered the matter in some detail, I have concluded that the evidence as to whether there was an appearance of bias is inconclusive. Mr Harding seeks to place great weight on the judge's response to Mr Seelhoff's suggestion that the appellant was not understanding the judge's

question ("That's one interpretation"). The difficulty with assessing whether that response was, as alleged, flippant and indicative of a closed mind, is that it is highly contextual. One alternative possibility is that the judge was meaning to convey to Mr Seelhoff that she had to keep her mind open to alternative explanations for the appellant's difficulties in answering his question at that point. The appearance of bias test, as analysed by the Upper Tribunal in the case of **Sivapatham (Appearance and bias) [2017] UKUT 00393 (IAC)** is directed to the question of how the conduct would be perceived by a fair-minded observer, but that depends very much on precisely how the judge spoke those words and exactly what was said next – of which there is no audio-recording. There is more force in the appellant's contention that the judge's cross-examination was unduly detailed and amounted to her descending into the realm. The HOPO's Note states:

> "At the end of my cross-examination the judge cross-examined. She did ask a lot of questions and at one point A's reps stated to the judge that she had been questioning for longer than Respondent, to which the Judge stopped questioning and put some of the questions through A's reps during re-examination. The Judges' cross-examination was regarding A's divorce evidence to which the A gave contradictory answers, at some point stating she had a divorce and other times saying she had an annulment because the marriage was never valid."

8. Whilst this Note supports Mr Seelhoff's account of the judge asking a lot of questions, it does suggest that once this was drawn to her attention she responded by asking the appellant's representative to put some remaining questions she had to the appellant in re-examination. In the end, I do not need to reach a definitive conclusion on the issue of appearance of bias because I am satisfied that the judge's conduct of the hearing was compromised by a separate error, although one that interrelates with the extent of her own examination of the appellant. The appellant's account included a claim that she had been raped by [A]. By virtue of that claim the judge should have given consideration to treating her as a vulnerable witness under the Joint Presidential Guidance Note No 2 of 2010 Child vulnerable adult and sensitive appellant. Giving this matter due consideration may also have caused the judge to approach her own examination of the appellant on the issue of the divorce evidence differently, since the fact that the relationship had been consummated (albeit by coercion) was likely to be treated by the Bangladesh legal system as complicating the issue of whether to treat it as a nullity or as a divorce.

9. Neither party drew my attention to it but there are passages in the judge's decision which at first sight might suggest she did give consideration to treating the appellant as a vulnerable witness. At 20.5 the judge said this about the medical evidence:

> "20.5 The appellant provided evidence of hospital treatment in October 2013, but I am not satisfied that she has established, even to the lower standard, that any treatment she may have

> received was required because of an alleged kidnapping in January 2013, nine months earlier. The appellant claims to suffer some psychiatric problems but she has not established this, even to the lower standard. The only medical evidence that she has produced is from Bangladesh and records minor physical ailments and that she has attempted to self-harm. There is no medical or psychiatric report from an expert in the United Kingdom concerning the appellant's mental health and no evidence that she has received any treatment since she has been in the United Kingdom. The appellant has not provided any medical evidence in relation to her second claimed kidnapping which, she claims, lasted for several months."

At 20.24 she stated:

> "20.24 The respondent relied, at the hearing, upon the appellant's inconsistent evidence about whether and when she was raped in detention. I would normally be loathe to place weight upon such inconsistencies given the sensitive nature of the subject matter. However, having found that her account is credible, I find it appropriate to place weight upon this also."

11. The judge was entitled perhaps to attach significant weight to the relative lack of medical evidence, although the evidence from Bangladesh doctors recording an attempt of self-harm should not arguably have been so quickly cast aside given her account of kidnap and rape. In any event paragraph 20.24 is exceedingly problematic. As it reads, it is saying the judge found the appellant credible. That is flatly contrary to the rest of the decision and so must therefore be regarded as a typing error. But if regarded as a typing error, which I think it must be, then the judge is saying that because she found the appellant's account not credible, it was appropriate to place weight upon the appellant's inconsistent evidence about whether and when she was raped in detention. That is back to front. The adverse credibility finding in this issue could only have been based for the judge on those inconsistent findings. Or, if they were based on anything else, implausibility for example, then the only reason given by the judge at 20.6 for disbelieving her claim to have been kidnapped and raped in 2014 was that it was implausible she would still have been living at home given that [A] had abducted her from there in 2013. The judge nowhere addresses whether she considered the appellant's account of rape at several different locations as coherent, plausible or consistent, aside from the one implausibility mentioned. Further, the judge does not link her decision not to take account of the sensitive nature of the issue or rape to the state of the medical evidence. In short, the judge failed to demonstrate that she had given due attention to whether to treat the appellant as a vulnerable witness and whether, to ensure that she kept her mind open to the possibility that the appellant was a vulnerable witness, she conducted the entirety of the hearing with sensitivity, including by avoiding examining the appellant herself at some length.

12. In light of the above it is not necessary for me to address the appellant's second ground which focused on the judge's treatment of the witness evidence.

13. For the above reasons, I have decided to set aside the judge's decision for material error of law.

14. Given the nature of the judge's error it is not possible to preserve any of her findings of fact and the case is remitted to the FtT (not before Judge Parker). That is not ideal since the appellant's appeal was the subject of a previous appeal decision by Judge O'Malley set aside by UTJ Bruce in February 2017, but I see no real alternative.

Directions

15. **In order to assist the task of the judge(s) responsible for hearing the case next, I direct**

    (1) that within 14 days from this decision being sent to the parties the appellant's solicitors liaise with the respondent with a view to agreeing on the identity of a suitable doctor; and

    (2) that the agreed doctor, within 6 weeks of this decision being sent, prepare a medical report on the appellant, with particular reference to the issue of whether the appellant's medical diagnosis is consistent with her account of rape and kidnapping.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed H H Storey Date: 15 March 2018

Dr H H Storey
Judge of the Upper Tribunal