Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05238/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on:**
On 22 May 2019	**On 30 May 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ELIZABETH [O]
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Lateef Kareem, solicitor with Atlantic Solicitors
For the respondent: Ms Nathalia Willocks-Briscoe, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse her a derivative right of residence as the mother of a Swedish child, who is 3 years old. The appellant is a citizen of Nigeria.

Background

2. The respondent refused to grant the appellant a derivative right of residence because she had failed to provide evidence that the EEA national child was self-sufficient as required by Regulation 16(2) of the Immigration (European Economic Area) Regulations 2016, or that there was valid comprehensive sickness insurance. There was no dispute that this appellant, as the EEA national child's mother, is her primary carer, nor that the child would be unable to reside in the United Kingdom, were the appellant to be required to return to Nigeria. There was no evidence as to whether the appellant and her child would be able to live in Sweden.

First-tier Tribunal decision

3. The appellant did not produce to the First-tier Tribunal, nor to the Upper Tribunal, any schedule of her income and expenditure, nor supporting evidence thereof. There was no evidence about her having purchased comprehensive sickness insurance for the child.

4. The First-tier Judge put the case back to the afternoon, at which time a manuscript income and expenditure account was produced which showed support from Mr [A], who is not said to be the child's father, and from her church, which was equal to the expenditure she alleged to have. There were no supporting documents.

5. First-tier Judge Dineen concluded that he could not be satisfied that the appellant's child was self-sufficient and that the appellant had failed to engage with concerns on that point in the refusal letter.

6. At [10], the Judge said this about the sickness insurance point:

> "10. Moving on to the question of insurance, the appellant's representative has produced some documents relating to an Aviva policy which appear in the appeal bundle, *but that is a policy which does not appear still to be in effect.* At the hearing, he handed up further documents indicating that a policy of insurance with Aviva was currently held and is due to expire next month. *However, those documents did not make clear what cover was provided."*
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> [*Emphasis added*]

Grounds of appeal

7. The appellant appealed to the Upper Tribunal, alleging that there was 'overwhelming evidence' before the First-tier Tribunal that the appellant met the requirements of the Rules and that, applying *Magill v. Porter* [2001] UKHL 67 and other more recent authorities, the immigration judge had exhibited a closed mind and/or had prejudiced the appeal, such that the appellant was denied 'the most important requirement of natural justice, the opportunity to be heard'.

8. Mr Kareem, who settled the grounds and has appeared throughout, asserted that he had 'insisted that [the appellant] should be given the opportunity to be heard before the Tribunal' and that the appellant had not yet recovered from the shock of not being permitted to do so. He asserted that he had been sent out of the room, with his client, while the Judge had an unsupervised discussion with the Home Office Presenting Officer, then re-admitted and the appeal dismissed without any evidence being given. No record of proceedings or statement of truth from Mr Kareem or the appellant was produced with the grounds of appeal.

Permission to appeal

9. An allegation of bias by a Judge is a serious matter. Permission to appeal was granted on the basis that it was arguable that this experienced First-tier Judge had shown bias by 'not allowing the appellant to present her case before the [First-tier Tribunal], by preventing her representative to do the examination-in-chief, and for the Home Office to cross-examine her if necessary'.

10. The Judge granting permission noted that it was difficult to clarify what had occurred at the hearing by reference to the Judge's notes, but that if the allegations were made out, unfairness would have been shown.

11. The appeal was referred to the Principal Resident Judge to consider further directions.

Rule 24 Reply

12. There was no Rule 24 Reply by the respondent.

Judge's comments

13. PRJ O'Connor directed Judge Dineen to respond to the grant of permission. Judge Dineen said that he had given his decision orally in the presence of the parties on the day of the hearing, and had refreshed his memory from the file, but could not recall, some 3 months after the hearing, who had been present apart from the appellant and Mr Kareem. He noted that the issues had been narrowed down to self-sufficiency and comprehensive sickness insurance. He noted the paucity of evidence from the appellant and Mr [A] as to her financial circumstances and that he had stood the appeal out to allow her to improve the evidence before him.

14. The evidence had not been much improved by the extra time. He could not imagine that he would have prevented oral evidence being given if the appellant wanted to give it, and if it was to be more than a repetition of the contents of her witness statement. The Judge noted that

> "13. The grounds of application do not state what such evidence would have been, had it been presented, or the extent to which it would have remedied any shortcoming in the appellant's documents or written statement.

> 14. If I had prevented the giving of such oral evidence, I find it difficult to imagine that there would not have been immediate reasoned protest from the appellant's representative, particularly as the grounds of application for permission to appeal state that there is overwhelming evidence before the Tribunal.
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> 15. I have not seen, as I would have expected to see if I had wrongly excluded oral evidence, any statement made on the day, as soon as possible thereafter, or at any time subsequently, setting out the appellant's account of what happened at the hearing, and stating the evidence she would have given. The first I have heard of the matter is in the grounds of application for permission to appeal, which I received on 08/04/19. …
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> 17. If it is intended to suggest that I discussed the appellant's case with the Home Office Presenting Officer in the absence of the appellant, I make it clear that I do not accept that I would make such a basic and improper error."

15. The Judge's response was disclosed to the parties in a Memorandum by Upper Tribunal Judge O'Connor dated 15 April 2019.

16. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

17. At the hearing, I asked Mr Kareem to indicate the evidence on which he relied in his assertion that the Judge was biased and excluded the appellant from giving oral evidence. I asked whether he had prepared a statement of truth and brought with him a copy of his record of proceedings to support these extremely serious allegations.

18. Mr Kareem said he had not understood that he needed to do so. In the absence of any witness statement from the appellant or her representative to say what she would have said, or what occurred at the hearing, I checked the Judge's notes, and asked Ms Willocks-Briscoe whether the respondent's record of proceedings indicated that there had been any such issue at the hearing, and in particular, whether Mr Kareem had raised the matter directly with the Judge.

19. I observed that the Judge's notes do not record any objection by the representative on the day of the hearing, and on my enquiry, Ms Willocks-Briscoe said that the brief record of proceedings on the respondent's file did not do so either.

20. Mr Kareem then began to give evidence about what had occurred at the hearing, but Ms Willocks-Briscoe observed, correctly and having regard to the guidance of the Upper Tribunal in *Ortega* (remittal; bias; parental relationship) [2018] 298 (IAC), that if Mr Kareem wished to give evidence, he could not also represent the appellant.

21. I gave directions, giving Mr Kareem until 12 noon the following day, 23 May 2019, to provide me with a statement of truth, and the respondent a

right to respond by 12 noon today, following which I indicated that I would decide whether to deal with the appeal on the papers, or to list it for a further hearing. In the latter case, Mr Kareem might find himself professionally embarrassed and need to arrange another representative for the appellant.

22. Mr Kareem's statement of truth was received on 23 May 2019 at 12:32 hours, 32 minutes outside the deadline I had given him. He did not exhibit any record of proceedings, having admitted frankly at the hearing the previous day that he had kept no notes of the First-tier Tribunal proceedings. Nothing has been received from the respondent.

23. Having considered how to proceed, I am satisfied that a further oral hearing is unnecessary and that I can proceed to decide this appeal on the documents and submissions before me.

Evidence before the Upper Tribunal

24. The material parts of Mr Kareem's statement of truth are as follows:

> "… 4. I attended the hearing with the appellant, and the case was called around 12 noon. The matter was set back to be heard after lunch.
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> 5. On getting back, the Judge did complain that our bundle did not contain the Income and Expenditure Schedule, therefore we should prepared [sic] same and exhibit it within our documents. The matter was set back again to be heard at 3.00 p.m.
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> 6. We got back to the Court at 3.00 p.m., presented the Schedule as directed. The Learned Judge directed that the appellant and myself to leave. I confirm that he was alone with the Presenting Officer. No reason was given prior to us leaving why it was necessary for us so to do.
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> 7. We were called back about 15 Minutes later only for the Judge to tell us again that he thinks the Insurance the Client exhibited is comprehensive and that there is no evidence of money coming from her Sponsor into her account therefore he was going to dismiss the appeal.
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> 8. I confirm that the Appellant gave no oral evidence before the Learned Judge. I submitted that it will be in the interest of justice that the Learned Judge permits us to present our case and the initial concerns that were raised would be addressed. This request was refused.
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> 9. The Learned Judge then indicated that he would dismiss the appeal. Upon receipt of the written determination, it is confirmed that the appeal was dismissed.
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> 10. I state that I am fully aware of my duties towards the Tribunal. I am aware also of my duties to my client. My contemporary notes and

the record of the Tribunal would indicate that there was no reception of evidence nor did the case proceed as it should normally."

25. There are no notes exhibited to this statement and it is unclear to me what 'contemporary notes' are meant, given that Mr Kareem told me at the Upper Tribunal hearing that he had made no notes at all of the First-tier Tribunal hearing.

26. I have examined the purported witness statements of the appellant and Mr [A], relied upon by Mr Kareem. Neither is, in fact, a witness statement, as they are unsigned and undated: they are no more than a statement of proof.

    (a) The appellant's proof of evidence indicates that she would have said that she and her daughter have verifiable comprehensive sickness insurance and 'the necessary supports from friends and our local church so as to not recourse to public funds for our maintenance and accommodation'.

    (b) Mr [A]'s proof of evidence indicates that he would have said that he knew the appellant through the Winners Chapel International Church Dartford United Kingdom and is employed as an IT consultant. He would have said that 'aside from the assistance that the appellant is receiving from the church, Winner's Chapel, as a member, and also from other church members, I do personally assist her too by providing food stuffs and other necessities for her and the daughter. I also give her cash on a regular basis'.

    Mr [A] does not say how much he gives the applicant and there is still no signed statement from either of them.

Analysis

27. The proper treatment of an allegation of bias against a Judge has recently been the subject of a decision by the President of the Upper Tribunal, Mr Justice Lane, sitting with Upper Tribunal Judge Pitt in *PA* (protection claim: respondent's enquiries; bias) [2018] UKUT 337 (IAC):

> "***2. Allegations of judicial bias***
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> *(1) An allegation of bias against a judge is a serious matter and the appellate court or tribunal will expect all proper steps to be taken by the person making it, in the light of a response from the judge. …*
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> *(4) As a general matter, if Counsel concludes during a hearing that a judge is behaving in an inappropriate manner, Counsel has a duty to raise this with the judge.*
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> *(5) Although each case will turn on its own facts, an appellate court or tribunal may have regard to the fact that a complaint of this kind was not made at the hearing or, at least, before receipt of the judge's decision.*

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

28. There is before me no evidence that the alleged refusal to hear the appellant's oral evidence was raised with the Judge at the hearing at Hatton Cross on 23 January 2019, nor Mr Kareem's suspicion that the Judge had discussed the appeal with the Home Office Presenting Officer, in the absence of the appellant.

29. The grounds of appeal assert that had she given evidence, the appellant would have been able to clarify the level of cover of the sickness insurance she obtained for herself and the EEA citizen child, and that she has a 'common law right to a fair hearing' such that she should have been allowed to give oral evidence. For the latter, the appellant relied on the decision of the former President of the Upper Tribunal in *Alubankudi* (appearance of bias) [2015] UKUT 542 (IAC) which at [6]-[[8] says this:

> "6. Every litigant enjoys a common law right to a fair hearing. This entails fairness of the procedural, rather than substantive, variety. Where a breach of this right is demonstrated, this will normally be considered a material error of law warranting the setting aside of the decision of the First-tier Tribunal: see AAN (Veil) Afghanistan [2014] UKUT 102 (IAC) and MM (Unfairness; E&R) Sudan [2014] UKUT 105 (IAC). The fair hearing principle may be viewed as the unification of the two common law maxims *audi alteram partem* and *nemo judex in causa sua,* which combine to form the doctrine of natural justice, as it was formerly known. These two maxims are, nowadays, frequently expressed in the terms of a right and a prohibition, namely the litigant's right to a fair hearing and the prohibition which precludes a Judge from adjudicating in a case in which he has an interest.
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> 7. Further refinements of the fair hearing principle have resulted in the development of the concepts of apparent bias and actual bias. The latter equates with the prohibition identified immediately above. In contrast, apparent bias, where invoked, gives rise to a somewhat more sophisticated and subtle challenge. It entails the application of the following test:
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> > "*The question is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*" ...
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> 8. The authorities place due emphasis on the requirement that the hypothetical reasonable observer is duly informed. This connotes that the observer is in possession of all material facts. See, for example, Taylor v Lawrence [2002] EWCA Civ 90, at [61] - [63]. Furthermore, the hypothetical fair minded observer is a person of balance and temperance, " *... neither complacent nor unduly sensitive or suspicious*", per Lord Steyn in Lawal at [14]. Finally, it is appropriate to emphasise that the doctrine of apparent bias has its roots in a principle of some longevity and indisputable pedigree, namely the requirement that justice not only be done but manifestly be seen to be done: see, for example, Davidson v Scottish Ministers [2004] UKHL 34."

30. I am guided also by the judgment of the House of Lords in *Magill v. Porter* at [101]-[102] in the opinion of Lord Hope of Craighead, with whom Lord Bingham, Lord Steyn, Lord Hobhouse and Lord Scott of Foscote agreed:

> "102. In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, ... summarised the court's conclusions, at pp726H-727C:
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> > "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."
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> 103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question 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."

31. I ask myself, therefore, what facts have been established, the burden being on the appellant. The answer is 'none'. There is a bare assertion, not supported by Mr Kareem's non-existent record of proceedings, nor by the brief record of proceedings of the respondent or the Judge's notes, that an experienced First-tier Judge excluded the oral evidence of the appellant and spoke in private to the Home Office Presenting Officer, having excluded the appellant and Mr Kareem from the hearing room. Mr Kareem had a duty to take a proper note of the hearing, to raise any such allegations directly with the Judge at the hearing, and to ensure that they were properly recorded in his record of proceedings and that of the Judge. He did none of that.

32. There is also no evidence that the oral evidence, even if given, was relevant. This was a case which turned on the documentary evidence as to the extent of any insurance which the appellant and her EEA citizen child have, and also, whether she (via her mother, the appellant), is financially self-sufficient. In respect of that issue, the appeal before Judge Dineen was woefully ill-prepared.

33. There was no evidence to support the applicant's very rough income and expenditure account, even when produced late in the afternoon of the hearing, although she had been on notice since the refusal letter that both the insurance and self-sufficiency questions were in issue. Such evidence as there was indicated that far from being self-sufficient, the appellant was half-supported (on her figures) by a friend from her Church, and relied on charity from her church for the other half of her needs, receiving 'financial and material support from the church welfare system' as set out in a letter of 1 February 2018, which did not descend to particulars of what she received.

34. It is not clear to me what the appellant's oral evidence would have done to improve that information: certainly, her proof of evidence, even if unchallenged, was no more than a bare assertion that she was kept from poverty and dependence on benefits by the kindness and charity of Church members. The First-tier Judge was entitled to regard that as not discharging the burden of proving that the appellant and her EEA citizen child were self-sufficient.

35. I am not satisfied that the evidence before me could lead a fair-minded and informed observer, fully informed of the circumstances (so far as possible on this evidence) to conclude that there was a real possibility that the First-tier Judge was biased.

36. There is no reliable evidence that the Judge did refuse to admit the appellant's oral evidence or collude with the Home Office Presenting Officer in the manner alleged.

37. Nor, setting aside the question of bias, do the grounds establish any material error of law in the Judge's decision. The evidence of self-sufficiency was not there, nor was there evidence that the Aviva policy was for comprehensive sickness cover.

38. This appeal is hopeless and is dismissed.

DECISION

39. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of no error on a point of law

    I do not set aside the decision but order that it shall stand.

Date: 24 May 2019 Signed Judith AJC Gleeson
Upper Tribunal Judge

Gleeson