Upper Tribunal
(Immigration and Asylum Chamber)

Bano (procedural fairness, withdrawal of representatives) [2019] UKUT 00416 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow	**Issued on**
on 5 July 2019	
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Before

Mr C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ARSHAD BANO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Haddow, Advocate, instructed by Anderson Rizwan, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

(1) Fairness means fairness to both sides: it does not mean favouring the appellant at the expense of the respondent.

(2) Tribunals must ensure appellants have a fair hearing, but they should not be intimidated by unjustified withdrawal of representatives.

(3) Unless unfairness has resulted in there being no proper consideration of their case at all, appellants who allege procedural unfairness may find it difficult to have a decision set aside, without showing that they may have suffered prejudice through inability to present a better case.

DETERMINATION AND REASONS

1. On 10 September 2018 the respondent refused the appellant leave to remain on human rights grounds.

2. The appellant appealed to the FtT. On 8 November 2018 the FtT issued notice of a full hearing to take place on 13 December 2018.

3. Practice Directions of the FtT and UT, and standard directions issued, required the appellant to serve her evidence on the FtT and on the respondent not later than 5 days before that hearing. The same time limit applied to documents to be relied upon by the respondent.

4. A covering notice advised the appellant that it was important to submit her documents "as soon as available".

5. FtT Judge Green dismissed the appeal by a decision promulgated on 18 December 2018. As appears from paragraph 3, the appellant did not comply with foregoing directions and did not explain that shortcoming. Statements were provided on 10 December 2018.

6. In a letter faxed to the appellant's solicitors and to the FtT on 12 December 2018 the respondent sought, in response to those statements, to file a copy of an application made by the appellant and the decision in her subsequent appeal in 2009. The respondent said that the evidence she provided therein was at odds with the statements she had just produced.

7. It is necessary to clarify that from before making her application to the respondent until the time of the FtT hearing, the appellant was represented by Mr A Liaquat of LKW, Solicitors. From the time of making her application for permission to appeal to the UT until the hearing before us, she has been represented by Mr Liaquat of Anderson Rizwan, Solicitors. Mr Haddow advised us that although the two are related there was no connection or communication between them about this case. In the rest of this determination our references are to the first mentioned Mr Liaquat only.

8. At paragraph 3 of his decision Judge Green narrates that Mr Liaquat objected to admission of the respondent's productions, sought an adjournment, and was offered 3 hours to take instructions on the earlier decision, which was admitted into evidence. Mr Liaquat declined that offer, asked for a 40-day adjournment, and when that was refused, withdrew from acting. The hearing proceeded, and the appeal was dismissed. The material discrepancies between the circumstances advanced in 2009 and in 2018 were significant to the outcome.

9. Correcting the several grammatical errors in the grounds of appeal to the UT, their essence is as follows:

> … The FtT Judge refused the adjournment request made by the appellant's representative when the respondent produced new evidence during the hearing. Further, the Judge

proceeded with the hearing while the appellant was unrepresented. The appellant has not had a fair hearing …

10. Those grounds are commendably succinct, but they are disingenuous in failing to disclose that the appellant was herself late in producing the evidence by which she intended to support her case, to which the new evidence from the other side was a response. The grounds are inaccurate in saying that the respondent's evidence was produced in course of the hearing; it was intimated the day before, and Mr Liaquat told the FtT he had read it, although at that stage there were some pages missing from the copy provided by the respondent. The evidence may have been new to him, but it was not new to his client, who was party to the proceedings in 2009. We accept that may have been difficult and perhaps rather embarrassing for Mr Liaquat, through no fault of his own. We were advised by Mr Haddow that Mr Liaquat had known of the existence of the prior proceedings, but not of the details.

11. It is not now said, as it was by Mr Liaquat, that the FtT should not have admitted the information from the respondent. It would have been absurd to enable an appellant to conceal her hand until late in the day, and then to prevent the respondent from contradicting her by matters of indubitable public record.

12. The duty of fairness would be owed not to the appellant's representative but to the appellant herself; but fairness cannot be assessed without considering the interests of all parties, including the public as represented by the Secretary of State. The document was the appellant's own document, being the means by which she had originally obtained admission to the United Kingdom. She was aware of it, as were the other members of her family who were with her at the hearing, one of whom (at least) had been a witness at the earlier hearing.

13. The first question is whether it was unfair, as Mr Haddow submitted, to offer an adjournment of 3 hours.

14. We consider that plainly was fair. Mr Haddow accepted in the course of his submissions that in general it is not necessary to give any notice of intention to cross-examine on a previous inconsistent statement, even where a criminal conviction may be the result. He was unable to formulate any reason why immigration proceedings should be an exception. The only surprise to the appellant was that information which she and her family knew was also now known to others. Mr Liaquat had the documents the day before. The circumstances were not difficult to apprehend. The questions to ask the appellant and her witnesses were obvious. We see no reason why 3 hours would not be enough for an ordinarily competent representative to regroup and be ready to proceed. No sensible argument was made for it not being enough.

15. Nothing said to Judge Green, or since, begins to justify insistence at the outset on a 40-day adjournment. The reason advanced by Mr Liaquat was "to obtain and serve a subject access request on the respondent", which makes very little sense. Whatever it means, the appellant has not acted upon it in the time since the FtT hearing.

16. We observed that even if 3 hours turned out not to be enough to prepare fully, it was ample to prepare a reasoned explanation of why longer was needed. Mr Haddow submitted that the Judge had closed his mind to the possibility of any delay beyond 3 hours. As he puts the matter in his written submission at paragraph 12, "… it was unfair … to refuse to adjourn for longer than 3 hours". We see no justification for that line of challenge, which is an entirely unsupported allegation of bias or pre-judgment. There is nothing in the decision to suggest that if Mr Liaquat had come back with good reasons for longer delay, the Judge would have failed to consider that application on its merits, as he was bound to do.

17. We observed during submissions that on the application form submitted to the respondent and giving rise to these proceedings, the appellant declared an earlier entry clearance application but not the one which gave rise to the 2009 appeal. While Mr Haddow submitted that the respondent always knew about the earlier appeal and could have founded upon the discrepancies, that convenient omission by the appellant may explain why the matter did not come to light earlier.

18. We see no justification for the conduct of Mr Liaquat in (a) opposing admission of the documents, (b) attempting to force the FtT into a lengthy adjournment or none, or (c) leaving his client unrepresented.

19. We are, however, left with the question whether the FtT should have adjourned once Mr Liaquat had withdrawn.

20. It is highly undesirable that representatives should try to force a tribunal's hand by unjustified withdrawal, and tribunals should not lightly give way to such pressure; but when faced with such a situation, there remains a duty to ensure that an appellant has a fair hearing.

21. Mr Haddow referred us to *Pine v Law Society*, [2001] EWCA Civ 1574, [2002] 2 All ER 658. He submitted that denial of legal representation might create unfairness, depending on such factors as the complexity of the allegations and facts, the nature of the unrepresented person, and their capacity to advance their own case.

22. In *Pine* at [11] the Vice-Chancellor summarised the principles to be derived from the European Convention jurisprudence on article 6 in the words of *Airey v Ireland* 32 Eur Court HR Ser A (1979): [1979] 2 EHRR 305, as follows:

> "only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to obvious unfairness of the proceedings can such a right be invoked by virtue of Article 6(1) of the Convention."

23. The present proceedings are not governed by article 6, but we are content to apply the same principle.

24. The appellant knew what the documents meant for her case. If she kept her representative in the dark in the hope that her self-contradictions would not emerge, that was her choice. She had her daughter and other relatives and supporting

witnesses with her on the day. They were not together a team of representatives, but they had some experience of such proceedings, and clear knowledge of the circumstances. All they needed to do was tell the truth.

25. The appellant and her family members did not ask for an adjournment on the withdrawal of Mr Liaquat. Her daughter made submissions in support of the appeal at the end of the hearing.

26. Applying the above principles, we find that the appellant was able to advance her claim, unrepresented, without any unfairness. The circumstances did not require the Judge to raise the possibility of adjournment further with her.

27. Mr Haddow invited the UT to conclude (as put in his written submission) that, "Had the FtT proceeded fairly, it is not possible to rule out the possibility that the appellant and her witnesses may have been able to satisfactorily answer the credibility challenges now made by the respondent. Consequently, the FtT's failures … represent an error of law".

28. The UT's standard directions, issued to parties with the notice of hearing, reminded them of the presumption that if the decision of the FtT is set aside its re-making will take place at the same hearing, based on the evidence before the FtT and any further evidence admitted, and that parties must prepare accordingly in every case.

29. Directions also require parties to apply for admission of further evidence, either to establish error of law, or for any re-making. No such application was before us.

30. Mr Haddow advised us at the outset that no statement had been obtained from Mr Liaquat (or anyone else) and it was not proposed to call him to give evidence; nor was there, even now, any proposal to call the appellant or any member of her family to indicate what they would have said at the hearing if they had been given a greater opportunity. This is even though the appellant has had much longer than the 40 days asked for by Mr Liaquat to show how her case might be improved.

31. If this decision were to be remade on the evidence which was before the FtT, there could not rationally be a different outcome: as the judge remarked, the appellant's story in this appeal is diametrically opposite to that presented in her earlier appeal.

32. We recognise that procedural fairness may require re-hearing even of an apparently hopeless case, where there has been no proper judicial consideration. Our view that this is no such instance is fortified by the absence of any hint that the appellant has a case better than she showed to the FtT.

33. In *HA and TD v SSHD* [2010] CSIH 28 Lord Reed, giving the opinion of the Court, said:

> [15] Finally, it is necessary to bear in mind that a procedural impropriety will not vitiate a decision if it is apparent that no prejudice was suffered: *Ahmed* v *Secretary of State for the Home Department* [1994] Imm AR 457 (following *Malloch* v *Aberdeen Corporation* 1971 SC (HL) 85 at pages 104 and 118).

34. We conclude that (a) there was no procedural impropriety, in any of the ways argued for the appellant, and (b) it is apparent, even if there was impropriety, that no prejudice was suffered.

35. Three general points emerge:

(1) Fairness means fairness to both sides: it does not mean favouring the appellant at the expense of the respondent.

(2) Tribunals must ensure appellants have a fair hearing, but they should not automatically be intimidated by unjustified withdrawal of representatives.

(3) Unless unfairness has resulted in there being no proper consideration of their case at all, appellants who allege procedural unfairness may find it difficult to have a decision set aside, without showing that they may have suffered prejudice through inability to present a better case.

36. The appeal to the UT is dismissed. The decision of the FtT shall stand.

37. No anonymity direction has been requested or made.

9 September 2019
UT Judge Macleman