Upper Tribunal
(Immigration and Asylum Chamber)

KD (Inattentive Judges) Afghanistan [2010] UKUT 261 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 20th May 2010

Before

Mr Justice Nicol
and
Senior Immigration Judge Perkins

Between

KD

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: G. Davison, instructed by Shahzad's solicitors

For the Respondent: S. Walker, Home Office Presenting Officer

1. The parties to an appeal are entitled to expect the Judge both to be alert during the hearing and to appear to be so. Consequently, if a Judge actually falls asleep or gives the appearance of not giving the appeal his full attention, there may be grounds for setting aside the determination on the basis that there has not been a fair hearing.

2. It is preferable for any concern about the behaviour or inattention of the Judge to be raised at the hearing.

3. When such a ground of appeal is raised, it is only likely to succeed if there is cogent evidence of the actual or apparent behaviour in question.

DETERMINATION AND REASONS

1. The Appellant in this case wishes to come to the UK to join his sponsors – one of his brothers, SM, and his nephew, FM. He relies on paragraph 317 of the Immigration Rules which allows, in certain circumstances, dependent relatives to be granted entry clearance. The Entry Clearance Officer refused the application on 9 March 2009. The Appellant appealed on the ground that he did satisfy the Immigration Rules and also on the ground that refusal was contrary to Article 8 of the European Convention on Human Rights, but on 8 December 2009 Immigration Judge D dismissed the appeal. On 18 January 2010 Senior Immigration Judge Waumsley ordered that the appeal be reconsidered.

2. The Appellant is an Afghan national. He gives his date of birth as 1 January 1940 which would have made him 69 at the date of the ECO's decision. He suffers from some mental disability or illness and has done so since his birth. Its exact nature is unknown but it has the effect of leading him to behave like a young child. The ECO had been unable to interview the Appellant but he accepted that he did have this disability. In addition to his brother in the UK, the Appellant has a number of other siblings. He has a sister, S, who lives in Kabul. She is married and has a large number of children of her own. The sponsors' evidence was that she did not have the ability to look after the Appellant.

3. One of the Appellant's other brothers, NM, had lived in Pakistan. He fled to the USA because of persecution by Taliban terrorists and was granted political asylum there. NM had left behind in Pakistan his wife, ZM, and their five children. The Appellant lived with ZM, his sister-in-law, in Islamabad. Before 2007 NM had supported his wife, their children and the Appellant.

After that, the UK sponsors said that they had taken over responsibility for supporting the Appellant. FM owned a take away pizza business which gave him an income in the region of £28,000. He rented a three bedroom house where he lived with his wife and three young children. SM worked at the same pizza business and earned £340 per month. He lived in a four bedroom house with his wife and two children. Both sponsors offered to accommodate the Appellant.

4. So far as is material, paragraph 317 says:

> 'The requirements to be met by a person seeking indefinite leave to enter … the UK as the ….dependent relative of a person present and settled in the UK are that the person:
>
> (i) is related to a person present and settled in the UK in one of the following ways:
>
> ….
>
> > (f) the …brother, uncle…over the age of 18 if living alone outside the UK in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the UK; and
>
> (ii) is joining or accompanying a person who is present and settled in the UK or who is on the same occasion being admitted for settlement; and
>
> (iii) is financially wholly or mainly dependent on the relative present and settled in the UK; and
>
> (iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds; and
>
> (iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and
>
> (v) has no other close relatives to whom he could turn for financial support…'

5. The ECO refused the application for a number of reasons. He did not accept that the Appellant was related as claimed to the two sponsors. There was no evidence that the sponsors had sent money to the Appellant or visited him. It appeared to the ECO that the Appellant was dependent on support from his brother NM. The ECO was not satisfied either that the sponsors could maintain or accommodate the Appellant without recourse to public funds. The ECO commented that NM who had provided the Appellant with financial and emotional support had gone by choice to the USA. The inability of the Appellant to join NM in

the USA was not a good reason to grant him entry clearance to come to the UK. The Appellant also had a sister in Kabul.

6. At least some of these reasons appear to be related to the disappearance of a bundle of documents which those acting on behalf of the Appellant had sent to the ECO. Judge D did accept that the Appellant was related as he claimed to the two UK sponsors. He accepted that the Appellant could be maintained and accommodated in the UK without recourse to public funds. He did not, however, accept that either of the sponsors had been sending regular remittances to the Appellant and so he did not accept that they had been responsible for his maintenance while he was in Pakistan. He thought that NM had continued to support the Appellant as well as his (NM's) wife and children in Pakistan. He did not accept that the Appellant would, if entry clearance was refused, be living alone in the most exceptional compassionate circumstances. He currently lived with NM's wife and children and Judge D did not accept that they had been granted residence in the USA. He concluded 'On the basis of my findings of fact I am satisfied that the refusal of the application does not interfere with the family life the appellant enjoys in Pakistan.'

First stage reconsideration: was there legal error in Judge D's determination?

7. The grounds for seeking reconsideration can be summarised in this way:

   a. At a number of points during the hearing Judge D appeared to be falling asleep. He either did not, or gave the appearance of not, giving the appeal his full attention.
   b. The determination contains a number of factual errors. This reinforced the first concern. It was also an independent ground of appeal.
   c. The treatment of the Article 8 ground of appeal was perfunctory and insufficiently reasoned.

Actual or apparent inattention

8. At the hearing before Judge D, the Appellant was represented by Ms Cole-Wilson, counsel. She has provided a statement in which she says as follows:

> 'Upon entering the hearing room and on at least two further occasions during the hearing, the Immigration Judge appeared to be sleeping. Upon Counsel for the Appellant and the 1st sponsor (the Appellant's brother) entering the court room in the presence of the usher, the Immigration Judge's

> head was bowed and it took what appeared to be at least 20 seconds before he acknowledged the presence of the part… There was no representative on behalf of the Respondent in attendance.
>
> On at least two further occasions during evidence, the Immigration Judge appeared to bow his head and close his eyes for what appeared to be up to 10 seconds each time. This was noticed and commented upon by the sponsors following the hearing and counsel duly noted her brief's back sheet to this effect.'

The back sheet does indeed contain a contemporary note which says that 'Judge appeared to be sleeping both on entering the court and at various times during the hearing.' The application for reconsideration, which was settled by Ms Cole-Wilson on 3 January 2009, and so about 6 weeks after the hearing on 20 November 2009, included comments to the same effect.

SM and FM have provided witness statements confirming what Ms Cole-Wilson has said.

9. As we have said, the allegation that the determination contained factual inaccuracies is relied on in support of this ground as well. In the course of his determination, Judge D said:

> (i) 'The UK sponsor's son produced financial statements. I have accepted that he has the ability to maintain the appellant, although his annual earnings do not exceed £8,000'
>
> In fact the person to whom Judge D was referring (FM) had provided evidence that his income was £28,000.
>
> (ii) Referring to NM, Judge D said, 'There is no evidence to show that all his family have been granted permission to join him in the United Kingdom…There is no documentary evidence to show that that the appellant's [sic] has made an unsuccessful application to join his brother in the United Kingdom….The application is based on the assertion that those members of his family living with him have all been granted leave to enter the United Kingdom …'

Each of these three references to the United Kingdom should have been to the United States.

10. Judge D was asked to comment on the grounds of appeal. He said 'I [am] dumbfounded by the allegations. Let me state at the outset that I emphatically deny the claim that I fell asleep at any time during the proceedings I am unable to fathom what conduct on my part could have given rise to such a perception. If I believed that there was any truth in the allegations I would

have no difficulty at all in admitting them and taking corrective measures.' He accepts that the determination did make the errors to which we have referred in the previous paragraph. However, he says that it can be seen from his notes of the proceedings (which he has provided) that he made an accurate contemporaneous record of the evidence and submissions in the course of the proceedings.

11. We asked Mr Walker, the Home Office Presenting Officer, whether he wished to have the opportunity to cross examine Ms Cole-Wilson on her statement. He said that he did not.

12. Mr Davison on the Appellant's behalf asked us to find that the Appellant had not had a fair hearing, either because Judge D had fallen asleep and actually allowed his attention to wander, or because he had given the impression that he had and justice should be seen to be done as well as done.

13. Now that we have seen Judge D's notes of the evidence we do not think that the errors in the determination help to establish that he was actually asleep. He does on a number of occasions properly record in his notes that it was the aspiration of NM's family to join him in the *United States* rather than the *United Kingdom*. The notes of evidence do not include the accurate amount of FM's income, but that may be because the amount was not referred to in the course of the hearing.

14. However, whether Judge D actually fell asleep is not the end of the matter. A similar point arose in *Stansbury v Datapulse* plc [2004] ICR 523 CA where it was alleged that one of the lay members of an Employment Tribunal had fallen asleep. Peter Gibson LJ said at [28]

> 'The Employment Tribunal in *Kudrath v Ministry of Defence* 26 April 1999 were, in my judgment, right to say that it was the duty of the tribunal to be alert during the whole of the hearing, and to appear to be so. It seems to me that an analogy with cases of bias is appropriate. In cases of bias the appearance of bias, as observed through the eyes and ears of a fair-minded and informed observer, will vitiate a hearing: see, for example, *Porter v Magill* [2002] AC 357, 494 per Lord Hope of Craighead. A member of a tribunal who does not appear to be alert to what is being said in the course of a hearing may cause that hearing to be held to be unfair, because the hearing should be by a tribunal each member of which is concentrating on the case before him or her. That is the position, as I see it, under English law, quite apart from the European Convention on Human Rights. It is reinforced by article 6(1) of the Convention….'

15. It is preferable for such a complaint to be made swiftly before the Tribunal in question. That should allow the difficulty to be remedied and for the hearing to continue effectively and fairly. In turn, that will save the expense and delay of an appeal. However, as the Court of Appeal also said in *Stansbury* at [23]:

> 'It is always desirable that a point on the behaviour of the employment tribunal be raised at the employment tribunal in the course of the hearing, but it is unrealistic not to recognise the difficulty, even for legal representatives, in raising with the employment tribunal a complaint about the behaviour of an employment tribunal member who, if the complaint is not upheld, may yet be part of the employment tribunal deciding the case.'

16. In ordering reconsideration, SIJ Waumsley alluded to the need for cogent evidence to make out a complaint of this kind. We agree. However, we consider in this case that there is sufficient evidence that Judge D gave at least the appearance of not giving the hearing the attention that it required. We have in mind in particular, the contemporary note on her brief by Ms Cole-Wilson, her detailed account of the events in the grounds of appeal which were drafted shortly afterwards and supported in due course by her own statement and those of the two sponsors. There was no HOPO present at the hearing and the usher was not present throughout. Mr Walker has not sought to challenge any of the witnesses on this matter. Finally, while the mistakes in the determination do not speak directly to Judge D's ability to record the evidence, they hardly inspire confidence that this was an appeal to which he gave the attention which the parties were entitled to expect.

17. Accordingly, we determine that the Appellant did not have a fair hearing before the Immigration Judge. That alone is sufficient to require us to proceed to the second stage of the reconsideration, but we will comment briefly on the other grounds.

Factual errors

18. There is no dispute that Judge D was in error in the matters to which we have referred in paragraph 9. Of these, possibly the first was the most important. This is because the Judge may have been influenced by the size of the earnings of the UK family members in concluding that they had not made the remittances to the Appellant which were claimed. If FM had been earning just £8,000 pa that may have been a fair point. It lost very much of his force if, as was the evidence, he was earning over three times that amount. Judge D properly

observes that in his review of the evidence at paragraph 4(b) he said that FM's business had yielded annual earnings of £28,000. In addition, it is fair to note that Judge D recorded that FM had not claimed that he personally had remitted money to the Appellant. However, that still leaves uncertainty as to whether the Judge had the correct figure in mind when he made his finding on the totality of the resources available to the UK family to make remittances.

19. A more fundamental difficulty for the Appellant is that these errors would not be material if they stood alone: they do not touch the question as to whether the Appellant satisfied the requirement in the Immigration Rules of living alone in the most exceptional compassionate circumstances.

20. We would not have found that the factual errors alone amounted to material errors of law.

Article 8

21. All that the Judge said about Article 8 was, 'On the basis of my findings of fact I am satisfied that the refusal of the application does not interfere with the family life the appellant enjoys in Pakistan.'

22. In our judgment this was plainly inadequate. It puts the issue the wrong way round. The Appellant's complaint was not that refusal of entry clearance would interfere with the family life he enjoyed in Pakistan, but that refusal would interfere with his family life with his relations in the UK. Even if it was to be inferred that the Immigration Judge did not make this mistake, the single sentence did not adopt the structured approach required by cases such as *Razgar* [2004] 2 AC 368. In our view, Mr Walker rightly conceded that this was an error of law.

23. For this reason and because of the unfairness of the hearing before Judge D for the reasons that we have given, we must reconsider the merits of the Appellant's appeal against the refusal of entry clearance.

Second Stage: Should the appeal against refusal of entry clearance be allowed?

24. Having had the opportunity to review the documentation, Mr Walker accepted that the Appellant was related as claimed to his two sponsors. Mr Walker accepted that the Appellant was wholly or mainly dependent on relatives who were present and settled in the UK. The sponsors' ability and willingness to maintain the Appellant in the UK without recourse to public

funds was also accepted. Although Mr Walker initially did not accept that they had adequate accommodation, having heard the evidence of FM and SM, he also agreed that they could accommodate the Appellant without recourse to public funds. What, therefore, remained in dispute (before oral evidence was called) was whether the Appellant was living alone in the most exceptional compassionate circumstances. We turn to consider the evidence on this issue.

25. SM gave evidence before us through a Dari interpreter. He confirmed the contents of his witness statement of 16th November 2009. Amongst other things, this had said 'Due to the Appellant's fragile state of mind my brother has told his wife to stay with the Appellant pending the outcome of this application. It is absolutely imperative that the Appellant's vulnerability is understood hence the reason for my sister-in-law having to separate from her husband in the interim and staying behind with the Appellant. He cannot be left behind on his own as he is a danger to himself. There is nobody to look after him in Afghanistan. My sister living in Kabul has her own family commitments and finds it very hard with her own family and cannot do anything for him.'

26. SM added that his sister-in-law, Z, had twice cancelled visits to the American Embassy to collect the visas for her and her 5 children to emigrate to the USA. They now had an appointment to go on 24 May 2010. If they all went to the USA, there would only be the Appellant left in Pakistan. There were no other family members in Pakistan and the Appellant would not be able to live on his own. The Appellant had had mental disabilities since his birth and had never grown out of a childhood state. In Afghanistan there was only his and the Appellant's sister. She could not look after the Appellant because of her own family commitments. She had a husband and 6 – 7 children aged from about 7 - 18. They lived in just three rooms (with a very small kitchenette, bathroom and toilet). In any case, in their culture a woman did not look after a man. There was no cross examination. In answer to questions from the Tribunal SM said that his brother, NM, and sister-in-law, Z, had 5 children. The oldest was about 26. NM had been told that all the work towards getting the visas had been completed for his wife and all of their children. The only delay had been because of the Appellant's situation. None of Z's children were working in Pakistan.

27. FM gave evidence in English. He confirmed the accuracy of his witness statement of 16 November 2009 which had corroborated what his father had had to say about the Appellant's position in Pakistan. He, too, said that Z and her

children in Pakistan were expecting to receive visas to travel to the USA. Their passports had been with the American embassy for some time and so the American authorities knew about the ages of all of the children. In Islamabad they lived in rented accommodation. None of the other family members (apart from the Appellant) suffered from mental ill health.

28. In his submissions, Mr Walker said that, while he could not formally concede the appeal, he did accept that all of the requirements of r.317 were satisfied. As we have said, at the conclusion of the evidence, he agreed that the Appellant could and would be accommodated by the sponsors without recourse to public funds. He agreed that the Appellant's sister in Kabul could not be expected to look after the Appellant. We should proceed on the basis that NM's wife and all of their children now in Pakistan would obtain visas and would go to the USA. When that happened, the only family members who would be able to look after the Appellant were those in the UK. Mr Walker accepted that the Appellant on his own in Pakistan would be in the most exceptional compassionate circumstances because of his disability and his age.

29. In our view, Mr Walker's approach was sensible and humane. In a literal sense the Appellant is not living on his own and was not at the date of the Entry Clearance Officer's decision. However, he would be in that position imminently once Z and her children left for the USA. We accept the evidence which was before us that there remained only the formality of issuing the visas. A system which allows a child in his twenties (as the oldest son of NM is) to join a refugee will strike someone familiar with the UK law as generous but we have reminded ourselves that on the evidence before us the American Embassy had had the passports for some time without raising what would have been an obvious objection. There is a statement from Z in the papers before the Tribunal. She says that:

> '[the Appellant] is residing with us and I am taking care of him and as you know that our case to USA has been completed but our going to the USA has been delayed because of [the Appellant]. We can't leave him until you don't take him. Because there is nobody left to take care of him beside us, neither in Afghanistan nor in Pakistan and as you are aware of his mental condition so, I don't want him to wander along the roads, and I am waiting for the hearing of the petition filed against the refused case of [the Appellant]. '

30. Humanity has impelled Z to postpone her departure for the USA, but Mr Walker, quite rightly in our view, accepts that she will go to the USA. Her husband from whom she has been

separated for some three years is there. The principle of family unity is an accepted adjunct of refugee law and, in the UK is reflected in the attitude to family life for the purposes of Article 8 of the European Convention on Human Rights. It cannot be right that the Immigration Rules must be interpreted in such a restrictive fashion that the Appellant is only eligible to join his English sponsors after Z has actually left Pakistan and he, in her eloquent phrase, has started 'to wander along the roads.' Mr Walker does not argue that the Rules have to be so interpreted and we consider that he was right not to do so.

31. The appeal succeeds because the decision was not in accordance with the Immigration Rules. A decision on the Article 8 ground is not therefore necessary for the disposal of the appeal. We are, though, required to deal with each ground of appeal. In the unusual circumstances of the case we consider that there is family life between the sponsors and the Appellant. That is not usually so between brothers or between uncle and nephew. However, what is different here is the utter dependency which the Appellant has on his family in the UK for support. Without a wife or children of his own, that responsibility is necessarily thrust on to the somewhat wider family members. The denial of entry clearance would constitute an interference with that family life. Since we have held that the refusal of entry clearance is not in accordance with the Immigration Rules, it is not 'in accordance with the law' for the purposes of Article 8(2).

Conclusion

32. The appeal is allowed. It succeeds under the Immigration Rules and as a result of Article 8 of the ECHR.

Signed

Senior Immigration Judge Perkins
(sitting as) Judge of the Upper Tribunal