Upper Tribunal
(Immigration and Asylum Chamber)

Alubankudi (Appearance of bias) [2015] UKUT 00542 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 16 September 2015	.....

Before

The President, The Hon. Mr Justice McCloskey
Upper Tribunal Judge Canavan

Between

ALHAJA ALARAPE ALUBANKUDI

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Ms C. Charlton of Bhogal Partners Solicitors
Respondent: Ms J. Isherwood, Senior Office Home Presenting Officer

(i) One of the important elements of apparent bias is that the hypothetical fair minded observer is properly informed and possessed of all material facts.

(ii) The interface between the judiciary and society is of greater importance nowadays than it has ever been. Judges must have their antennae tuned

to the immediate and wider audiences, alert to the sensitivities and perceptions of others, particularly in a multi-cultural society. Statements such as that made by the FtT Judge in this case that "the United Kingdom is not a retirement home for the rest of the world" had the potential to cause offence and should be avoided.

DECISION AND REASONS

Framework of Appeal

1. This appeal originates in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") dated 28 February 2014, whereby the application of the Appellant, a national of Nigeria now aged 71 years, for Indefinite Leave to Remain in the United Kingdom outwith the framework of the Immigration Rules (hereinafter "*the Rules*") was refused.

2. The decision maker first considered whether the Appellant qualifies for leave to remain under the Rules. In doing so, the relevant history summarised was that the Appellant last entered the United Kingdom on 16 July 2009, pursuant to a 180 day multi-entry visitor visa issued on 26 August 2008 and valid until 26 August 2013. The application made on behalf of the Appellant was dated 24 October 2013. It was decided, firstly, that a refusal under paragraph 322(1) of the Rules was appropriate on the basis that variation of leave to enter or remain was sought for a purpose not covered by the Rules. Next, having regard to the terms of the multi-entry visitor visa and the Appellant's failure to honour "*any declaration or undertaking given orally, or in writing, as to the intended duration and/or purpose of .... stay*", the application was further refused under paragraph 322(7). The third conclusion made was that the application did not satisfy the Article 8 ECHR provisions of the Rules, specifically paragraphs 276ADE, 277C and Appendix FM. The decision continues:

> "*Notwithstanding the above your application has also been considered on compassionate and compelling factors*".

The considerations which were then identified are the Appellant's age (70); her state of health (general age related ailments only); her family connections with the United Kingdom (a daughter only); the death of her husband in 1997; her ability to live in Nigeria during most of the period between 1997 and 2009; and the absence of evidence that she would be exposed to ill treatment in the event of returning there. The decision continues:

> "*It is not considered that you have provided any evidence showing that your circumstances have significantly changed since you last left Nigeria on 16 July 2009, or that you would be living in the most exceptional compassionate circumstances should you return to Nigeria. All your representations have been taken into consideration and it is the view that you have not raised any exceptionally*

compelling or compassionate factors that would warrant a grant of leave in the UK."

The application was refused accordingly.

3. The First-tier Tribunal (the "*FtT*") dismissed the ensuing appeal. Its assessment was that the impugned decision interfered with the Appellant's right to respect for private and family life but was "*in accordance with the law and necessary for the economic well being of society*". In considering the issue of proportionality, the Judge noted the applicability of section 117A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"), proceeding to highlight the following facts and factors: the absence of evidence that the Appellant speaks English; her "*accessing*" NHS medical treatment, to which her daughter knew she was not entitled, since first registering with a General Medical Practitioner in 1997; the inevitability of further recourse to free NHS treatment; the absence of evidence of "*substantial integration*" into life in the United Kingdom or of an extensive private life outside the family unit.

4. Next, having highlighted the evidence, including several doctors' letters, relating to the Appellant's state of health, the Judge noted the absence of any claim that she required long term personal care to perform everyday tasks. The Judge was satisfied that such longer term personal care as the Appellant may require, will be available to her in Nigeria. He also noted the ability of the Appellant's daughter to continue to support her mother financially, evidenced by, *inter alia*, her second home in the United Kingdom. The Judge further found that the Appellant would not be at risk of any ill treatment in Nigeria, noting in particular the evidence of both the Appellant and her daughter that in 2009 the Appellant fully intended to return there. In summary, the *status quo ante* 2009 would be re-established upon the Appellant's return to Nigeria.

5. Permission to appeal was granted in the following terms:

> "*The decision as a whole displays cogent evidence based reasoning. However, the grounds argue bias and lack of a fair hearing rooted in the Judge's remark at paragraph 51 that* ***'there is a great deal of authority to the effect that the United Kingdom is not a retirement home for the rest of the world'****. While this by no means discloses any clear error of law, particularly taken against the content of the rest of the decision, the need for justice to be seen to be done on balance renders the ground arguable.*"

[Emphasis added]

Thus the issue for us is whether the decision of the FtT is tainted by apparent bias.

Governing Legal Principles

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 FtT: 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.

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:

> "*The question is whether the fair minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was bias.*"

See Porter v Magill [2001] UKHL 67, at [103].

In Re Medicaments [2001] 1 WLR 700, the Court of Appeal provided the following exposition of the task of the appellate, or review, court or tribunal:

> "*The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was bias. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility … that the Tribunal was bias. The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances.*"

In Lawal v Northern Spirit [2003] UKHL 35, the House of Lords reiterated the importance of first identifying the circumstances which are said to give rise to apparent bias.

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.

Decision

9. On behalf of the Appellant Ms Charlton submitted that the "*retirement home*" comment was indicative of the Judge's adverse inclination against her client's case which, she suggested, was manifest in certain other parts of the operative passages in the determination. In developing this argument, she relied on:

   (a) The Judge's statement that there was no evidence that the Appellant spoke English and that this would be considered a barrier to integration.

   (b) His observation that if the Appellant were to find medication and personal assistance expensive in Nigeria, her daughter's financial resources could be deployed to this end and, in particular, her daughter's second home in the United Kingdom could be sold if necessary.

   (c) The indifference to the interests of others viz the daughter and grandchildren which this statement displayed.

   Focusing particularly on the "*retirement home*" comment, Ms Charlton submitted that this was belittling to and insulting of both the Appellant and her daughter and, further, overlooked that thanks to the daughter the Appellant had at all times been fully self-supporting.

10. The question in this appeal is whether the decision of the FtT is vitiated by apparent bias and, hence, unsustainable in law by reason of the passage quoted in [5] above. We are satisfied that the assessment of the hypothetical fair minded, reasonable and properly informed observer would be as follows. First, there is no suggestion (much less any evidence) that the Judge has, or had, any predisposition against persons such as this Appellant or is anti-immigrant or anti-immigration generally. Second, as the permission Judge noted, the determination, read as a whole, displays "*cogent evidence based reasoning*". To this we add the modest adjustment that, at the stage of the Judge's reasoning, evidence had, of course, matured into findings, an important distinction: see MK Pakistan [2013] UKUT 00641 (IAC). Furthermore, there is no challenge to any of the judge's findings on the basis of irrationality or the disregard of material evidence or the intrusion of immaterial factors. We observe that the presence of any of these vitiating elements could, in principle, lend sustenance to the Appellant's complaint of apparent bias. However, none is evident.

11. The hypothetical observer would also note the balanced, considered and neutral terms in which the Judge has expressed himself in a series of important passages, beginning at [40] and ending at [53]. It is noteworthy that within these passages the Judge has accurately and adequately summarised the medical and other evidence adduced on behalf of the Appellant. No issue is taken with these assessments or summaries. Furthermore, the language throughout these passages is that of the

dispassionate, disinterested adjudicator giving primacy to the requirement of impartiality enshrined in the statutory judicial oath of office. We further consider that the observer would not be troubled by the other passages in the determination highlighted on behalf of the Applicant, noted in [9] above, either singly or in combination. These passages embody statements which are unexceptional, considered and balanced.

12. At this juncture, we consider it appropriate to reproduce the relevant paragraph, [51] in its entirety:

> "*While* [the daughter's] *desire to care for the Appellant in the UK is natural and understandable neither could have had any legitimate expectation that the Appellant would be allowed to remain unless she was able to bring herself within the requirements of the Immigration Rules. There is a great deal of authority to the effect that the UK is not a retirement home for the rest of the world.*"

The immediately ensuing paragraph begins with the following:

> "*I have not been satisfied that the Appellant would be returned to Nigeria in a state of destitution or that there are compelling and/or compassionate circumstances such that she should be granted leave outside the Immigration Rules.*"

The hypothetical reasonable observer would, in our view, find an element of empathy in the passages of the FtT's determination reproduced above. The observer would further take into account that superior courts have expressed themselves in terms comparable to those of the challenged statement and would readily conclude that the Judge had in mind pronouncements of this *genre* in the "*retirement home*" sentence in [51].

13. Such pronouncements are exemplified particularly in EV (Phillipines) v SSHD [2014] EWCA Civ 874, at [60]:

> *"Just as we cannot provide medical treatment to the world so we cannot educate the world".*

Somewhat comparable is the statement of Lord Nicholls in N v SSHD [2005] UKHL 31, at [17]:

> "*But, as the Strasbourg jurisprudence confirms, Article 3 cannot be interpreted as requiring contracting states to admit and treat AIDS sufferers from all over the world for the rest of their lives ....*
>
> *True it is that a person who comes here and receives treatment while his application is being considered will have his hopes raised. But it is difficult to see why this should subject this country to a greater obligation than it would to someone who is turned away at the port of entry and never receives any treatment.*"

We bear in mind that one of the traits of the hypothetical observer is that he is properly informed. He would, therefore, be aware of these other

judicial pronouncements, emanating from higher courts and would conclude that this is what the FtT Judge must have had in mind when he made the "*retirement home*" comment. The consideration that the Judge's statement can be traced to authoritative judicial sources would fortify the observer's confidence in the impartiality of the Tribunal. Still further reassurance would be provided by the truism that, day and daily, there are countless examples in the FtT and Upper Tribunal of cases not dissimilar to that of the Applicant failing on Article 8 ECHR grounds, properly so. The hypothetical observer would also take into account the stream of judicial pronouncements, spanning many years, that Article 8 confers no right to select the country in which one wishes to enjoy and develop family life. Finally, the hypothetical observer would be influenced by the assessments and considerations in [11] and [12] above.

14. We consider that the linguistic formula selected by the Judge was unfortunate. It had the potential to cause offence and we accept that, in this instance, it did so. It was insensitive. It further had the potential to convey to the Appellant and her mother an unfavourable impression of the legal process in which they had been involved, generating a sense of unease. We are satisfied that it had this effect. The interface between the judiciary and society is of greater importance nowadays than it has ever been. In both the conduct of hearings and the compilation of judgments, Judges must have their antennae tuned to the immediate and wider audiences. As the decision in AAN demonstrates, Judges must be alert to the sensitivities and perceptions of others, particularly in a multi-cultural society. We consider that statements of the kind which stimulated the grant of permission to appeal in the present case should be avoided. The interaction of most litigants with the judicial system is a transient one and it is of seminal importance that the fairness, impartiality and detached objectivity of the judicial office holder are manifest from beginning to end.

15. Drawing the various strands together and given our analysis in [10] – [14] above, we are satisfied that the hypothetical observer would conclude, following careful and informed reflection, that the decision of the FtT is fair, balanced, considered and, above all, impartial. We, in turn, conclude without reservation that the challenge based on apparent bias is devoid of merit and substance.

Conclusion

16. We dismiss the appeal accordingly and affirm the decision of the FtT.

Signed: Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY

PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 23 September 2015