Upper Tribunal
(Immigration and Asylum Chamber)

Azia (proof of misconduct by judge) [2012] UKUT 00096(IAC)

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
On 25 January 2012	.....

Before

Mr C.M.G. Ockelton, Vice President

Deputy Upper Tribunal Judge Garratt

Between

SANGAR AZIA

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms C Hulse, instructed by Braitch R B Solicitors

For the Respondent: Ms K Heath, Home Office Presenting Officer

A party alleging misconduct by a judge needs to prove it. Parties and their representatives need to ensure that the evidence is collected while memories are fresh. Permission to call evidence before the Upper Tribunal may be refused where, in circumstances where a party has not acted promptly to prepare and disclose evidence, it would be unfair to the other party, or not in the interests of justice.

DETERMINATION AND REASONS

1.
The appellant is a national of Iraq, now aged nearly 20. He arrived in the United Kingdom in 2008 and subsequently claimed asylum. His claim was refused. He was granted discretionary leave by reason of his youth. During the currency of that leave he applied for further leave, which was refused on 11 January 2011.

2.

He appealed to the First-tier Tribunal on grounds raising issues under the Refugee Convention and the European Convention on Human Rights as well as his entitlement to a grant of humanitarian protection. His appeal came before an Immigration Judge on 25 February 2011. At the beginning of the hearing the Judge was asked to consider adjourning the hearing in order for the appellant to have professional help from a counsellor or others, but, noting that previously the appellant had refused such help, the Judge refused the adjournment.

3.
A question was then raised about a report from Dr Alan George, which had been tendered in support of the appellant's case. The Presenting Officer observed that the report was evidently written for an entirely different appellant. Ms Meredith, counsel for the appellant, said that although that might be so, the passages referring to that appellant had been removed and the rest of the report should be admitted. The Judge declined to accede to that suggestion. He pointed out some passages in the report that referred to the other appellant and had not been removed, and noted that it did not appear that Dr George had given any opinion on this appellant.

4.
The Judge then heard oral evidence from the appellant and submissions from both parties. His determination was written on the day of the hearing. The substantive issues are dealt with in paragraphs 6 – 14. He concluded that the appellant was entirely lacking in credibility.

5.
The final paragraph of the determination, paragraph 15, notes that Ms Meredith (counsel for the appellant) had, during the hearing, demonstrated that she was unhappy about the judge's conduct of the hearing. One particular matter that evidently arose was the length of examination-in-chief of the appellant. The appellant (who has been represented throughout by the same firm of solicitors, Braitch RB Solicitors of Wolverhampton) had been directed to file and serve a witness statement to stand as evidence in chief at the hearing. The determination notes that the Judge had insisted that examination in chief be terminated after it had lasted 25 minutes.

6.
The Immigration Judge dismissed the appeal on all grounds.

7.
There was then an application for permission to appeal. The grounds, signed by Ms Meredith, raise a substantial number of issues. What may be the most significant relate to the Immigration Judge's conduct. In particular it is said (a) that he reached a view on credibility before considering the evidence, as is apparent from the fact that his view on credibility is stated in the determination before his description of the evidence; (b) that his conduct was "inappropriate" in that he intervened during the evidence and curtailed it, and prevented the appellant from having a fair hearing, that the appellant was in tears for part of it, that the appellant was sometimes not allowed to finish his answers, and that he has miscalculated the length of the examination in chief, which was 15 minutes; (c) that he gave his decision on the adjournment request without reasons, supplying the reasons only in the written determination. The grounds also assert that the Judge failed to take all the evidence into account in making his determination.

8.
The grounds of appeal are said to be accompanied by counsel's note. They were not so accompanied, and the note has never been provided to the Tribunal or (so far as we are aware) the Secretary of State.

9.
Permission was granted by a Judge of the First-tier Tribunal, who observed that counsel:

“makes a number of allegations about the conduct of the IJ which, if true, are capable of amounting to a material error of law. These are grounds which may or may not be true but warrant investigation.”

He granted permission on all grounds. His decision is dated 25 March 2011. The Secretary of State served a response saying that she did not consider the grounds were made out. [1]

10. No further information has been provided to the Tribunal in the ten months since then. Ms Heath told us at the hearing that those representing the appellant had written to the Presenting Officers’ Unit stating that the only evidence to be relied upon was that in the bundle prepared for the hearing before the Immigration Judge. The only other relevant communication is a letter from the solicitors to the Tribunal seeking a photocopy of the Judge’s notes, which was evidently sent to them, on whose authority we do not know. [2]

11. Ms Hulse appeared on the appellant’s behalf before us. She told us that although she was not aware of the Secretary of State’s response to the grant of permission, she proposed to establish the facts as to the Judge’s conduct by calling oral evidence. She did not propose to call Ms Meredith, who had kept a contemporaneous note. She told us that a note had been made shortly after the hearing by an interpreter engaged by the solicitors. She had not seen the note and no attempt had previously been made to serve it on the Secretary of State or the Tribunal. She proposed to call the interpreter and a social worker who had been present during the hearing and had not made any note. She was going to compile witness statements for these two witnesses and tender them for cross-examination.

12.
The Tribunal treats allegations made about the conduct of judges with the greatest seriousness. It goes without saying that if grounds of appeal, such as those raised in the present case, are made out, they are very likely to cause a determination to be set aside. But it is not sufficient to make the allegations: they must be substantiated in fact, and in a way that is in itself fair to all interests, including those of the respondent and of justice generally.

13.
Ms Hulse had been instructed late and no doubt did what she could. But it is quite clear that what was proposed was essentially unfair. Those representing the appellant had for a long time had access to the interpreter’s note and (apparently) counsel’s. Instead of serving and filing them promptly they had kept them back, so as to enable them to be produced at a hearing at which (if what Ms Heath told us is right) they had indicated no such evidence was to be called. They apparently thought that Ms Hulse could present the case properly even though she too had not seen the interpreter’s note and had had no indication of what the evidence of either of the two witnesses might be or whether the social worker could remember what had happened at the hearing.

14.
This is not an appropriate way to conduct civil litigation and it is a particularly inappropriate way to attempt to establish grounds of appeal relating to the alleged misconduct or inappropriate conduct of a judge, which, as Ms Hulse reminds us, is a matter of importance going beyond the outcome of an individual case. Allegations of that sort always need to be supported by evidence. The evidence needs to be served on the respondent and filed with the Tribunal in good time, so that it can be properly considered. It may be appropriate for this Tribunal to seek comments from the Judge. The Secretary of State will need to consider whether to call the Presenting Officer as a witness if she considers that

the allegations are groundless. None of this can be done if the evidence is not made available well in advance of the hearing.

15.
Directions may be given, but they should not be necessary. [3] Solicitors who allege that a judge has behaved improperly should know that they need to support the allegation with evidence, and should be prompt in bringing the evidence to the attention of the Tribunal and the respondent. They are likely to want to seek an early hearing of the matter, before memories fade. They are likely to ensure that any prospective witnesses make a note at the earliest possible opportunity. A contested trial of fact about what happened at a previous hearing may be necessary, but it can in some cases be avoided if all parties and the Tribunal are made aware of the strength of the case if it is a strong one. Conversely, failure to prosecute the case, failure to serve evidence, and reliance upon a witness who did not make a note in preference to a witness who did, may well indicate that a case is not strong.

16.
In the present case it seems to us that the grounds we have summarised at (a) and (c) in paragraph 7 above can have no merit. The statement, in a decision, of the decision itself before the reasons is obviously entirely unobjectionable. A Judge does not make his decision in real time as he writes or speaks his judgement: he makes the decision and then gives it, with reasons. And although reasons need to be given, there is no general rule that reasons for a procedural or interlocutory decision have to be given to the parties at the time the decision is made.

17.
So far as concerns the other grounds, despite Ms Hulse's best endeavours, we are entirely unpersuaded that she should be allowed to call her evidence in the circumstances we have recorded. We formally refuse permission for it to be adduced, for the reasons above.

18.
It follows that the Immigration Judge is not shown to have acted improperly. But it is clear that there were, at the time of the hearing, concerns about the appellant and his ability to do himself justice. The Judge decided to ignore those concerns on the basis of the material before him. We make no comment on that, evidently it is clear that the judgements he did made on the substance of the appeal and on the appellant's credibility would have to be seen in that light.

19.
Ms Hulse, after receiving the undertaking from Ms Heath to which we refer below, and after taking instructions, told us that she was content for us to determine this appeal on the lines set out in the preceding paragraph and dismiss it.

20.
The appellant is now undergoing counselling and has the active assistance of social workers. It may well be that he will wish to put further material before the Secretary of State. On the Secretary of State's behalf Ms Heath undertakes that if a fresh claim supported by new evidence from social workers, psychiatrists or counsellors is put before the Secretary of State within three months of 25 January 2012 it will be considered and, if the refusal is maintained, will be treated as a fresh claim giving rise to a new appealable decision.

21.
For the foregoing reasons, however, this appeal is dismissed.

Signed

C M G OCKELTON

Vice President of the Upper Tribunal

Immigration and Asylum Chamber

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[1] The appellant's solicitors state that they have never received this response.

[2] There is said to have been some correspondence, including a letter of 13 April 2011 indication that reliance would be placed on various items of evidence. None of these were served at that time or later on the Tribunal or the respondent.

[3] In the present case, directions were given, which perhaps unwisely were confined to the procedure after any error of law had been established.