

Dealing with allegations of bias against immigration judges

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Immigration analysis: Ben Amunwa, barrister at 36 Bedford Row, examines *Singh v Secretary of State for the Home Department* and argues that appellants must ensure allegations of bias are fully particularised, and supported by contemporaneous notes and complaints to the judge.

Original news

Singh v Secretary of State for the Home Department [2016] EWCA Civ 492, [2016] All ER (D) 16 (Jun)

The Court of Appeal, Civil Division, in dismissing the appellant's appeal, rejected an allegation of apparent bias, in particular, that a judge of the First-tier Tribunal (Immigration and Asylum Chamber) (FTT) had made remarks at the outset of an appeal hearing which indicated that he had had a closed mind and/or had prejudged the appeal. The court also made observations about how such allegations should be dealt with on an appeal to the Upper Tribunal (Immigration and Asylum Chamber) (UT).

What issues did this case raise? Why is it significant?

The issues were two-fold:

- whether the FTT judge appeared to be biased and the determination was therefore unfair, and
- whether the UT's dismissal of Mr Singh's appeal against the FTT had applied the wrong legal test

While the outcome of this case was highly fact-sensitive, its significance lies in the extensive recommendations made by the Court of Appeal (at para [53]) on the procedure to follow when an allegation of bias is raised against an immigration judge.

What is the background for this case?

Mr Singh claimed to have lived in the UK continuously for 14 years. He applied to the Home Office for leave to remain on that basis. His application was refused and he exercised his right of appeal to the FTT, which heard his appeal and dismissed it on the grounds that he had insufficient evidence of his claimed period of long-residence.

Mr Singh appealed to the UT. He alleged that the judge at the FTT appeared to be biased against him and the determination was tainted by unfairness. He relied on a short statement from the advocate who represented him at the FTT, which claimed that the judge had made certain statements at the start of the hearing that effectively meant that he had pre-determined the outcome of the appeal.

By the time the case came to the Court of Appeal, the FTT judge's note had disappeared from the UT's file, the Home Office Presenting Officer had no recollection of the events in the FTT and Mr Singh's solicitors at the FTT were not co-operating with his new representatives.

Given the disorderly history of the case and the lack of official guidance from the tribunal itself on dealing with appeals based on allegations of bias, the Court of Appeal set out some practical ways of dealing with such appeals efficiently and avoiding the omissions that were made in Mr Singh's case.

How helpful is the judgment in clarifying the law in this area? Are there any remaining grey areas?

The underlying legal principles relating to bias were not in dispute and remain well established by authorities from civil litigation.

What was less clear was how the mechanics of appeals based on judicial bias should operate and what is expected of:

- FTT judges
- Home Office presenting officers
- the appellant's legal representatives, and
- the UT

Lord Justice Davis set out seven points of non-exhaustive guidance, ranging from the level of scrutiny required when considering the grant of permission to appeal, to obtaining comments and notes from the FTT judge and seeking observations from the Home Office presenting officer. While strictly obiter, a material failure by the UT to adhere to this guidance may well found a successful appeal on grounds of procedural fairness.

What does all this mean for lawyers and their clients? What should they do next?

Bias is a serious matter and representatives must take care to ensure that sufficient evidence has been obtained and the arguments pleaded with clarity in order to get permission to appeal on that basis.

Davis LJ was clearly unimpressed by the quality of the evidence relied upon in this case (a short statement from the first advocate which raised as many questions as it answered).

If tribunals adhere to the Court of Appeal's guidance in *Singh*, it may be tougher for appellants to get permission on the basis of evidence that lacks specific details of the evidence of actual or apparent bias.

Appellants' advisers would do well to ensure that the allegations of bias are fully particularised and, if possible, supported by contemporaneous notes and/or complaints to the judge.

All advocates in the FTT must be alert to the need to protest to the judge in appropriate cases where there are signs of bias or the appearance of bias (and make a contemporary note of such protest). Failure to do so may weaken any subsequent appeal based on bias.

How does this case fit in with other developments in this area of law? Do you have any predictions for future developments?

This is not the first time that gaps have been highlighted in the procedural guidance available to the Immigration Tribunal. Earlier in 2016, Blake J had suggested that the tribunal presidents issue guidance on the operation of a new rule permitting secret evidence in the Tribunal (see *Immigration Lawyers Practitioner's Association v Tribunal Procedure Committee & Lord Chancellor* [2016] EWHC 218 (Admin), [2016] All ER (D) 133 (Feb) at para [85]). *Singh* continues the process of supplementing the lack of guidance with judicial observations.

Avoiding the risk of unfairness in the Immigration Tribunal is an increasingly important theme at appeal hearings. As the government plans to hike hearing fees and deny greater numbers of appellants the right of appeal while in the UK, there may be some growth in litigation based on points of procedural unfairness, whether based on bias or other misconduct by the tribunal.

Interviewed by Duncan Wood.

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