Neutral Citation Number: [2016] EWCA Civ 492

Case No: C5/2015/0527

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**
**IA/31101/2013**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2016

**Before:**

**LORD JUSTICE DAVIS**
**LORD JUSTICE BEATSON**
and
**LORD JUSTICE LINDBLOM**

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**Between:**

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| **SARABJEET SINGH** | **Appellant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |

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**Anton Van Dellen** (instructed by **Abbott Solicitors LLP**) for the **Appellant**
**Christopher Staker** (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 11th May 2016

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# Approved Judgment

**Lord Justice Davis:**

Introduction

1. This appeal is founded on an assertion of apparent bias. It is said that the First-tier Tribunal Judge ("FTTJ") of the Immigration and Asylum Chamber made remarks at the outset of the appeal hearing before him which indicated that he had a closed mind and/or had prejudged the appeal. It is said that the hearing was in consequence unfair. It is further said that, on appeal to the Upper Tribunal, the Upper Tribunal Judge ("UTJ"), in dismissing the appeal, failed to apply the correct legal test to the issue raised and, in consequence, failed properly to address the relevant points.

2. Leave to appeal to this court was granted by Burnett LJ on 19 May 2015.

3. Before us the appellant was represented by Mr Van Dellen. The respondent Secretary of State was represented by Mr Staker. Neither of them appeared below. I would say at the outset that the way in which this issue was approached by the parties below and those who represented them has scarcely helped in its resolution, whether by the UTJ or by this court.

Background

(1) The decision of the FTTJ

4. The appellant was born in India in 1967. On 5 July 2012 he made an application to the Secretary of State for Indefinite Leave to Remain, on the basis of asserted 14 year long residence in the United Kingdom. The appellant claimed to have arrived in the United Kingdom clandestinely and unlawfully in March 1997 and to have resided in the United Kingdom since then. By a decision letter dated 5 August 2013 the Secretary of State refused the application. It was not accepted that the applicant had arrived in the United Kingdom in 1997 as he claimed. It was noted, among other things, that the appellant had provided no documentary evidence of residence prior to July 2008, notwithstanding a prior request by the Home Office for any such documentation. There was also a lack of other evidence relating to the alleged residence. Overall, the application was rejected by reference to Paragraphs 276B and 276D of the Immigration Rules. The application was also refused on family life/private life grounds.

5. The appellant appealed. The matter came on for hearing before FTTJ Cohen sitting at Hatton Cross on 19 February 2014. The appellant was represented by counsel, Mr Mohsin Aslam. The Secretary of State was represented by counsel (although described on the front page of the determination as a Presenting Officer).

6. At the conclusion of the hearing, the FTTJ took time – as is the required practice – to produce his determination in writing. It was promulgated on 28 February 2014. It is, on its face, a detailed, careful and thorough determination, extending to 32 paragraphs.

7. The FTTJ recorded, in summary, the contents of the Secretary of State's decision letter. He then fully summarised the appellant's evidence and case. Among other

things it had been said that the appellant had only secured long-term accommodation in 2008 and so only had documentation from then: although he did produce at the hearing (although not previously produced to the Secretary of State) one medical attendance record for 2005. He said that he had lived and worked illegally, being paid in cash, keeping no bank account, paying all his bills in cash and not claiming benefits. From 1997, on his arrival in the United Kingdom, he had been offered accommodation by Sikh friends met at the Gurdwara in Hounslow.

8. In the course of his determination the FTTJ noted that the appellant had produced no documentary evidence to support his claim that he had arrived in the United Kingdom in 1997. The FTTJ said that there would be at least some documentation to support the claim of arrival before 2005. He said: "I find the fact that there is not to be indicative of the fact that the appellant simply did not come to the UK in 1997 as claimed by him."

9. The FTTJ further noted that, notwithstanding the asserted length of his residence, the appellant spoke only very broken English and required an interpreter. It was also noted that, aside from one witness (Mr Rashpal Singh Sidhu), the appellant adduced no evidence or even letters from people he had met at the Gurdwara or otherwise or with whom he had lived to support his claims.

10. It was the appellant's case and evidence that he had resided with Mr Rashpal between 1997 and 2002 at a room at his house. Mr Rashpal gave evidence to like effect, even claiming in oral evidence that he remembered the precise date – 5 April 2002 – when the appellant moved out. The FTTJ recorded, at some length, numerous and significant discrepancies both in and between the oral evidence of the appellant and of Mr Rashpal. The FTTJ did not find them to be witnesses of truth. He found as a fact that they did not reside together between 1997 and 2002. The FTTJ further found that the appellant had not started continuously to reside in the United Kingdom until 2008.

11. There was no evidence of the appellant having a family life in the United Kingdom. It was accepted that he had established a private life: but interference with that by removal was adjudged to be proportionate, in the circumstances of the case.

12. On the face of it, therefore, this was a thorough and properly reasoned determination, which had made unassailable findings of fact and which had drawn conclusions appropriate to those findings of fact.

(2) <u>The appeal to the Upper Tribunal</u>

13. The appellant sought permission to appeal to the Upper Tribunal.

14. After the hearing before the FTTJ and for the purposes of the proposed appeal Mr Aslam made a witness statement. It is dated 7 March 2014 (that is, over 2 weeks after the hearing). It reads as follows:

> "1. I was the advocate at the above appellant's hearing on 19th February 2014 at Hatton Cross before Immigration Judge Cohen instructed by Gramdan Solicitors.

2. At the beginning of the hearing I handed my skeleton argument to IJ Cohen. He addressed the appellant in the usual way and introduced himself. During his introduction he stated to the appellant that he did not agree with my skeleton argument that documentary evidence was of lesser importance in such appeals. In his view documentary evidence was of utmost importance and the absence of documentary evidence could not satisfy him that the appellant had been in the UK. He went on to say that if I did not agree with him then I could appeal his decision.

3. In my view the IJ's comments were wholly inappropriate as he was addressing the appellant before hearing any evidence and giving a clear indication that he had already made his decision. The IJ's comments visibly unsettled the appellant.

4. During the course of the hearing the IJ continually interrupted both examination in chief and cross examination to ask his own questions to the appellant. The IJ was aggressive in his tone and manner, which I believe affected the evidence of the appellant.

I declare that this statement is true to the best of my knowledge and belief."

15. Grounds of Appeal were lodged. Among other things, it was said that the FTTJ had demonstrated bias in prejudging the appeal and addressing his views directly to the appellant at the outset of the hearing. It was also said that "undue pressure" was placed on the appellant during the hearing "adversely affecting his evidence." It was said that the appellant was "unsettled as a result of the judge's inappropriate comments and behaviour".

16. Those allegations comprised two paragraphs of the Grounds. The remaining nine substantive paragraphs of the Grounds were devoted to an attack on the FTTJ's findings and reasoning and on asserted failures on his part to deal properly with the evidence or with the appellant's Article 8 rights.

17. Permission to appeal to the Upper Tribunal was granted by another judge on 6 June 2014. It was said: "Subject to establishing the facts, the way the Judge conducted the hearing arguably amounts to an error of law". It was further stated that the remaining Grounds could also be argued.

(3) The hearing before the UTJ

18. The appeal came on for hearing before Deputy Upper Tribunal Judge Parkes on 21 August 2014. The appellant had by now instructed new solicitors. He was (perhaps unsurprisingly) represented at the appeal by other counsel: not Mr Aslam. The Secretary of State was represented by a Presenting Officer: not the advocate who had appeared before the FTTJ.

19. Mr Aslam was not tendered to give oral evidence. No explanation for that is recorded in the UTJ's subsequent determination: and we ourselves, on enquiry, were given no explanation. There is, at all events, no suggestion that the respondent had stated in advance of the hearing that she agreed Mr Aslam's evidence and did not require his attendance. It looks, therefore, as though the appellant had simply proposed to proceed by reference, on this issue, to Mr Aslam's written statement: and the hearing then proceeded accordingly.

20. It may also be noted that the appellant himself put in no witness statement and gave no evidence about what had happened at the first hearing or to support Mr Aslam's assertions about the impact on the appellant.

21. A further feature of the hearing is that the UTJ was given no information, either in the form of a statement or note or even on instructions, of the recollections of the advocate who had appeared before the FTTJ. We asked Mr Staker about this. He was not able to assist. I did not gain the impression that that had been a deliberate decision on the part of the respondent in the light of what would be argued to be a wholly deficient statement of Mr Aslam: rather, it looks as though no one had applied their minds to obtaining the advocate's recollections.

22. Mr Staker did tell us that shortly before the hearing of the appeal before this court contact had been made with that advocate. Wholly unsurprisingly, she now has no recollection of events at the hearing before the FTTJ. Mr Staker also, during the course of the hearing before us, produced a short pro-forma document cursorily completed by the advocate after the hearing at Hatton Cross. Although we looked at it de bene esse, I would accept Mr Van Dellen's objection and would decline, in the circumstances, to have regard to it as evidence at this late stage.

23. In the event, the UTJ was left to deal with this issue, on the appellant's case, by reference to Mr Aslam's short written statement of 7 March 2014. However, the UTJ did have other material available to him. This was in the form of a Note dated 22 July 2014 from the FTTJ himself. It appears that, entirely appropriately, the Upper Tribunal had caused such a Note to be obtained from him in view of the appellant's present allegations.

24. This gives rise to another problem. For whatever reason, the Note, or any copy, can no longer be located. The Upper Tribunal seems to have misplaced it. When eventually contacted on this, the FTTJ himself by then no longer had retained any of his papers. The parties had no copy. Mr Van Dellen (who was himself instructed by solicitors other than those who represented the appellant below) in fact alluded to difficulties in obtaining papers – or indeed co-operation – from those previously instructed.

25. This court is thus reliant on the UTJ's description of that Note. The UTJ did not set out in his determination its contents verbatim. Instead, he summarised it: doing so, moreover, in a way which seems in places to have interwoven the UTJ's own comments. Before describing that Note, the UTJ had fully and accurately summarised the statement of Mr Aslam. Having done so, the UTJ said this:

> "The Judge replied, and I have a note dated the 22nd July 2014.
> He noted that there had been in fact no complaint about his

> behaviour to the Resident Judge at Hatton Cross and it follows obviously therefore no application to the First-tier that the hearing should simply be reheard by somebody else. He confirms that he had stated to the Appellant and the representative that in long residence cases documentation was of great importance as one would expect someone who had resided in the UK for fourteen years to have gathered significant documentation during that time, although I recognise that for someone [not] residing in the UK legally documentation may be more difficult to produce. He addressed both the Appellant and the representatives. Obviously if there was a disagreement then that would lead to an appeal."

26. The UTJ rejected this ground of appeal. He summarised the appellant's case as being one that the FTTJ had conducted the hearing unfairly. The decision of the UTJ was that the manner of the conduct of the hearing was not flawed and that the appellant had had a fair hearing. The UTJ observed, in fact, that complaints often can apply the other way: viz. that appellants are *not* sufficiently made aware of points which are on a judge's mind. The UTJ went on to say that the FTTJ had been entitled to ask questions and entitled to find the appellant as "frequently evasive." The UTJ found that it was not shown that the appellant had been unsettled or unable to put his case or that the FTTJ had prejudged the issue in question. The complaint was adjudged to have "no merit". The UTJ said: "I have no hesitation in rejecting it."

27. The remainder – indeed the majority – of the UTJ's determination deals with all the other grounds. As to those, the UTJ found that the FTTJ's assessment of the evidence was entirely proper and his determination gave entirely sufficient reasoning. Overall, there was no error of law in the determination.

28. For completeness, I should add that the appellant sought to pursue in his appeal to this court those further, substantive, grounds which had failed before the FTTJ and UTJ. Burnett LJ refused permission on those aspects, however: and so it is that this appeal is confined to the argument based on bias.

The legal approach

29. Mr Van Dellen made clear to us that he was not alleging actual bias on the part of the FTTJ. His argument was based on apparent bias.

30. There was no real dispute before us as to the relevant principle and required approach. It is conveniently encapsulated in the statement of Lord Hope in paragraph 103 of his speech in *Porter* v *Magill* [2002] AC 377, [2001] UKHL 67. The ultimate question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

31. We were also referred to *Southwark London Borough Council* v *Jiminez* [2003] ICR 1176, [2003] EWCA Civ 502. That was a case on rather special facts where, after much of the evidence had been concluded and when a two month adjournment was looming, the chairman of the employment tribunal made some observations, described as "preliminary views", which were to a degree very critical of the employer and

which encouraged settlement. It was held that such remarks, viewed objectively, did not give an appearance of bias.

32. In his judgment Peter Gibson LJ recorded that it was common ground that the premature expression of a concluded view or the manifesting of a closed mind by the tribunal may amount to the appearance of bias: paragraph 25. He also said, however, that he had "some difficulty" in understanding why a strongly held view could not be a provisional view: paragraph 38 (he was, of course, speaking in the context of a case where the views were expressed to be preliminary views). He nevertheless alluded to the need for caution in a judge indicating current thinking as "it is easy to be misunderstood, particularly if the views are expressed trenchantly": paragraph 40.

33. The distinction between an objective approach and a subjective approach is well illustrated by the case of *Ezsias* v *North Glamorgan NHS Trust* [2007] 4 All ER 940, [2007] EWCA Civ 330. In that case it was accepted that the tribunal chairman's subsequent explanation to the appeal tribunal acquitted her of actual predetermination of the case. Nevertheless the position had become irretrievable; the subsequent explanation did not displace, in the light of the written pronouncements that had been made at the time, the perception that a fair-minded and informed observer would have formed, to the effect that there was a real possibility that the chairman had a concluded view or closed mind as to the employee's prospects of success: see, in particular, at paragraphs 18 and 23-24 of the judgment of Maurice Kay LJ.

34. In *Arab Monetary Fund* v *Hashim (*1993) 6 Admin LR 348, Sir Thomas Bingham MR had said this (in giving the judgment of the court) at page 356:

> "But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."

35. I would respectfully agree. Indeed, such statements sometimes can positively assist the advocate or litigant in knowing where particular efforts may need to be pointed. In general terms, there need be no bar on robust expression by a judge, so long as it is not indicative of a closed mind. In fact, sometimes robust expression may be positively necessary in order to displace a presumption or misapprehension, whether wilful or otherwise, on the part of an advocate or litigant on a point which has the potential to be highly material to the case.

36. One other feature of the approach required to be adopted in this context is this. It is necessary to consider the proceedings *as a whole* in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased: see *Lodwick v Southwark London Borough Council* [2004] ICR 884, [2004] EWCA Civ

306 at paragraph 18 (per Pill LJ); *AB (Turkey)* v *Secretary of State for the Home Department* [2007] EWCA Civ 1535 at paragraph 25 (per Buxton LJ).

The arguments

37. Mr Van Dellen's arguments came to this. Closely and carefully read, Mr Aslam's statement showed that the initial remarks to the appellant by the FTTJ – made before any evidence had even been received – were, looking at the matter objectively, such as to give rise to a reasonable apprehension of bias. He submitted that such remarks gave rise to a perception, taking the required objective approach, that the FTTJ had either prejudged the case or had a closed mind. The FTTJ was, he said, indicating at the outset a settled view that the lack of documentation was fatal to the case: and the subsequent determination was simply the product of a mind which had been closed. Mr Van Dellen accepted that judges are within reason entitled, at an early stage of the hearing, to express preliminary views, even in trenchant terms. But in the present case, he submitted, the views were not stated to be preliminary or provisional and were expressed in unqualified terms: as reinforced by the reference to appealing. He further submitted that on appeal the UTJ had failed to deal with the matter by considering the objective approach laid down in *Porter* v *Magill*: even if the FTTJ had not in fact prejudged the case, the focus still had to be on the perception arising.

38. I should record that Mr Van Dellen did not pursue the complaints about the FTTJ continuously interrupting in the course of questioning in what was said to be an "aggressive tone and manner" or that the appellant's evidence was adversely affected. Not only were those allegations in Mr Aslam's statement wholly unparticularised they also had no support from any evidence of the appellant himself. It is clear enough that the appellant had been able to present his case in full.

39. For his part, Mr Staker queried if there was any real practical distinction which on occasion Mr Van Dellen maintained between prejudging a case and approaching a case with a closed mind. At all events, he said, viewing the matter both objectively and as a whole the appellant had simply failed to establish a case of apparent bias. The brief written statement of Mr Aslam was wholly insufficient to make out such a case.

Decision

40. It is regrettable that the way in which this case was dealt with below has meant that this court was in effect being required by Mr Van Dellen to construe the witness statement of Mr Aslam as though it were some statute or commercial contract.

41. The statement was made some two weeks after the hearing. It will have been based on Mr Aslam's recollection (he exhibits no contemporaneous note). He does not purport to set out the precise words which the FTTJ used; nor does he make clear if what was said was all said in one go or whether it was the product of an exchange.

42. In circumstances such as these the actual words used, just as much as the context and manner in which they are said, are all important. At all events, I can see no objection at all to the FTTJ stating, and at any early stage, that he did not agree with Mr Aslam's submission in his skeleton argument that documentary evidence was of lesser importance in these kinds of appeal. Not only was that a perfectly proper view for the

FTTJ to hold, it was entirely in order for him so to say with a view to avoiding any misapprehension on the part of Mr Aslam in thereafter conducting the appeal to the appellant's best advantage.

43. I am not impressed by the assertion that these remarks were addressed "to the appellant". They may have been made in introductory comments. But they were of a legal nature and Mr Aslam would have been sitting or standing very close to the appellant. The UTJ's description of the FTTJ's Note of 22 July 2014 also shows that was the FTTJ's own intention and perception. There is no reason whatever to reject that. The appellant himself, moreover, has given no evidence on that point or as to his understanding – if he had one – of what the FTTJ was saying.

44. The next sentence in paragraph 2 of Mr Aslam's statement is in indirect language. It does not purport to recite the actual words used. Mr Van Dellen latched on to the words "was of the utmost importance"; but that does not necessarily reflect the FTTJ's exact words. Moreover this sentence contains two separate propositions said to have been made by the FTTJ – and the incorrect grammar, furthermore, confirms that only the gist of what was recalled to be said is being attempted to put forward. It was in fact the second part of this sentence on which Mr Van Dellen particularly focused. However, it is noticeable that the FTTJ's Note of 22 July 2014 (as summarised by the UTJ), accepts in general terms that it was said that in long residence cases documentation was of "great importance". But it does *not* accept that it was said that, in the absence of such documentation, the FTTJ could not be satisfied that the appellant had been in the United Kingdom for the requisite period. It is true that there is then the reference to an appeal. But quite to what part of what had previously been said that comment (as recorded by Mr Aslam) attached is not, to my mind, at all clear: it could just as readily attach to the proposition that documentation was of great importance, which was the statement that the FTTJ himself accepted having made.

45. As I have said, the matter has to be looked at as a whole. What Mr Aslam seeks to say is also not consistent with the actual promulgated determination. It may be that there are cases where the statements or behaviour, as established, of a judge at the earlier stages of a hearing are such that they simply cannot be retrieved by the ultimate judgment itself. But reference to that judgment may, as in this case, be appropriate where the court considering an allegation of bias is seeking to ascertain the precise words which have given rise to the allegation. If the FTTJ's settled and stated view had been to the effect that the absence of documentation for the period before 2005 was fatal for the appeal he could have decided the appeal in short order on this point. But he did not. On the contrary, in his promulgated determination he said that the absence of relevant documentation was "indicative" of the fact that the appellant had not arrived in 1997. Thereafter the FTTJ went on to deal in considerable detail with the appellant's actual evidence, and the evidence of Mr Rashpal, in rejecting his case: as well as noting the appellant's very poor English and the failure to produce any other witness evidence and so on. Mr Van Dellen asserted that the mischief had by now occurred and that this determination was simply the product of an already closed mind. But that assumes that what Mr Aslam says is wholly accurate and complete. The point is that the promulgated determination of itself casts doubt on the accuracy and completeness of Mr Aslam's recollections.

Moreover, Mr Van Dellen's approach scarcely acknowledges a judge's proper functions in accordance with his judicial oath.

46. It is also, to my mind, a noteworthy and relevant point that it seems that Mr Aslam at no stage at the hearing sought to protest or to ask the FTTJ to recuse himself. Nor was any subsequent application made to have a re-hearing.

47. Ultimately it is for an appellant to show, on the facts, that there is a real possibility of bias, applying the objective test set out in *Porter* v *Magill*. The witness statement of Mr Aslam, unsupported by any supplementary evidence of Mr Aslam or any evidence of the appellant himself and when set in the context of the FTTJ's own Note (as summarised by the UTJ) and in the context of the proceedings taken as a whole, in my judgment is insufficient to show a real possibility of bias.

48. It is true that the UTJ did not expressly set out the *Porter* v *Magill* test. But in substance he was focusing on the issue of fairness and apparent fairness. The UTJ found that the evidence did not show that the FTTJ had prejudged the issues in question. The UTJ clearly had not been satisfied that the statement of Mr Aslam sufficied to make out the case. I think that his overall conclusion was a proper one; and in any event – given that the appellant's case rested entirely on the witness statement of Mr Aslam – this court has been able to make its own assessment of the matter.

49. In the result, therefore, I would dismiss this appeal.

Post - script

50. In granting permission to appeal (on the "some other compelling reason" ground) Burnett LJ indicated that this case might afford an opportunity for this court to indicate how such allegations should be dealt with on an appeal to the Upper Tribunal (Immigration and Asylum Chamber). Mr Van Dellen adopted this suggestion. He said that such guidance could be very useful, especially where, not infrequently, parties act in person before First-tier Tribunals and where, necessarily, tribunals in practice have sometimes to take on something of an investigatory role. Mr Staker on instructions opposed, at least initially, any such suggestion.

51. There is, as we were told, no Tribunal Rule on this point. Nor is there any other Practice Direction or Practice Statement or Guidance Note issued in the Upper Tribunal (Immigration and Asylum Chamber) of a kind corresponding to that issued in the Employment Appeal Tribunal. That gives detailed guidance (at paragraph 13) with regard to appeals based on an attack on an Employment Tribunal judge's conduct or on alleged bias: [2013] ICR 1382. Presumably the volume of complaints of that kind in employment cases has been such as to cause it to be considered necessary to have a Practice Direction covering that point: which, of course, also creates a desirable consistency of approach. It may be that in the Upper Tribunal that has not thus far been the experience and so no Practice Direction or other guidance has been thought necessary. I would, however, refer to the very helpful observations of the President of the Upper Tribunal (Immigration and Asylum Chamber), McCloskey J, in the case of *Wagner* [2015] UKUT 655 (IAC). This, at paragraph 12 of the decision, sets out some of the difficulties and some of the ways in which the

appellate tribunal can be assisted in ascertaining what occurred in the tribunal below, in circumstances where bias or misconduct is alleged.

52. It would not be appropriate, in my view, for this court to give, in the context of appeals to the Upper Tribunal, guidance of a kind replicating the detail of that found in the Practice Direction relating to Employment Appeal Tribunals. If this kind of appeal is to become more prevalent in this context then it would be much better for the Chamber Presidents, with their specialist expertise and their knowledge of the practicalities and in conjunction with the Senior President of Tribunals as appropriate, to decide whether or not to formulate any Practice Direction or Practice Statement or Guidance Note which may be considered necessary or desirable.

53. But that said, the problems that have been highlighted by the course of events in this particular case do for the present permit at least some observations to be made: and they are ones which, I think, should be made.

(1) An allegation of bias or misconduct can only too easily be raised by a disgruntled litigant. It is therefore important that any application for permission to appeal, if based (in whole or part) on such a ground, is closely scrutinised when consideration is given as to whether permission to appeal should be granted. Such an allegation, if to be sufficient to merit the grant of permission at all, should ordinarily be expected to be properly particularised and appropriately evidenced.

(2) If an allegation of bias or misconduct is raised which is adjudged sufficient to merit the grant of permission to appeal then it should be normal practice for the Upper Tribunal thereafter to obtain the written comments of the judge concerned: both in fairness to the judge and to provide the Upper Tribunal with a fuller picture.

(3) Such written comments of the judge, where obtained, should be provided to the parties for the purposes of the appeal hearing in the Upper Tribunal. In addition, such written comments should be retained on the file pending any possible further appeal to the Court of Appeal (the present case indicates the potential awkwardness arising from that failure).

(4) Proceedings in the First-tier Tribunal are not ordinarily recorded (it is not a court of record) and no transcript of the hearing will be available. There may be some cases where it may also be necessary to obtain the Tribunal Judge's own note or record of the entire hearing.

(5) It will normally be likely in such as the present cases to be of assistance to the Upper Tribunal to know what the advocate for the respondent has to say as to what happened or what was said before the First-tier Tribunal. In the present case neither the Upper Tribunal nor this court had the assistance of any such observations. It should be borne in mind that to provide such observations is the more likely to help produce a fuller and more accurate picture of what actually happened or was said in the First-tier Tribunal. There may be cases where the advocate concerned has no precise note or recollection. In that case, the Upper Tribunal at least can be so told.

(6) Whether oral evidence is needed at the hearing of the appeal on the issue of what happened or was said below should be carefully considered by the parties.

(7) Reflecting all the foregoing, it is likely to be important, in appeals of this nature, for the file to be reviewed and any directions given by an Upper Tribunal Judge in good time before the substantive appeal hearing.

54. These suggestions which I make are borne out of this court's experience of what happened in this particular case. They are intended to be neither prescriptive nor exhaustive. The general position remains that it is for a party alleging bias (whether actual or apparent) to place before the appeal tribunal the evidence and materials necessary to make good – if he can – such an allegation; and the outcome for each such case will depend on its own facts and circumstances.

**Lord Justice Beatson**:

55. I agree.

**Lord Justice Lindblom**:

56. I also agree.