Upper Tribunal
(Immigration and Asylum Chamber)

AAN (Veil) Afghanistan [2014] UKUT 00102 (IAC)

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 19 December 2013	**……**

Before

THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY,
THE VICE PRESIDENT, MR C M G OCKELTON

and

UPPER TRIBUNAL JUDGE GRUBB

Between

AAN
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Mr Richards, Senior Home Office Presenting Officer

(1) Where the face of a party or witness is substantially covered by a veil or other form of attire, it is incumbent on the Tribunal to strike the balance between the rights of the person concerned, the administration of justice and the principle of open justice. The Tribunal will consider options which

should, simultaneously, facilitate its task of assessing the strength and quality of the evidence, while respecting as fully as possible the rights and religious beliefs of the person concerned.

(2) Such measures may include the following:

(a) A sensitive enquiry about whether the cover can be removed, in whole or in part.

(b) Where appropriate, a short adjournment to enable the person concerned to reflect and, perhaps, seek guidance or advice.

(c) The adoption of limited screening of the person and/or minimising the courtroom audience.

This is not designed to operate as an exhaustive list.

(3) In cases where a Tribunal considers that the maintenance of the cover might impair its ability to properly assess the person's evidence and, therefore, could have adverse consequences for the appellant, the Tribunal must ventilate this concern.

(4) Issues of religious attire and symbols must be handled by tribunals with tact and sensitivity.

DETERMINATION AND REASONS

INTRODUCTION

1. The Appellant is an Afghani national, who arrived in the United Kingdom on 23rd January 2009, claimed asylum and was granted discretionary limited leave to enter. He is now aged 20 years, having been born on 3rd February 1993. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department ("*the Secretary of State*") dated 4th June 2009, whereby the Appellant's application for asylum was refused. By its Determination dated 4th August 2009, the Asylum and Immigration Tribunal dismissed the Appellant's appeal. In due course, the Appellant's legal representatives applied on his behalf for an extension of stay in the United Kingdom on a discretionary basis. Within the same application, the solicitors concerned reasserted the Appellant's asylum application and invoked paragraph 339C of the Immigration Rules and Article 8 of the Human Rights Convention. As these representations demonstrate, the Appellant continued to profess a fear of proscribed treatment in the event of returning to Afghanistan.

2. Progress thereafter was rather sluggish, the evidence indicating a process of requesting and receiving further information, such as a marriage

certificate, a witness statement and evidence of earnings. During this increasingly protracted period, the Appellant was convicted, on 24th May 2012, of assaulting his wife, a British citizen. (His wife re-enters the narrative at a later stage: see *infra*). The index offence was assault occasioning actual bodily harm. The Appellant received a commensurate sentence of 21 months detention in a Young Offenders' Institution. In due course, on 12th June 2013, the Secretary of State decided to deport the Appellant from the United Kingdom. This was the stimulus for his appeal to the First-Tier Tribunal ("*the FtT*") and the ensuing appeal to this Tribunal.

DETERMINATION OF THE FtT

3. On 16th August 2013, the FtT dismissed the Appellant's appeal on all grounds. The Appellant was represented at that hearing by counsel, while the Secretary of State was represented by the same official at both levels. Certain material aspects of the course of the hearing conducted by the FtT emerge from its Determination. Evidence was given by the Appellant on his own behalf. In addition, evidence was adduced from two witnesses, who were:

   (a) His sister, who is variously described as "A", "M" and "AE" in the Determination. [We shall describe her as "AE" hereinafter].

   (b) His sister's spouse, "JE".

   It is clear that the evidence adduced from these two witnesses was designed to confirm and fortify the Appellant's international protection claims, in particular his assertions concerning fear of exposure to proscribed treatment in the event of returning to Afghanistan.

4. In paragraph 16 of the Determination, there is a reference to the evidence given to the FtT by the female person professing to be the sister of the Appellant and the spouse of JE. It is recorded:

   > "The witness AE was called. She appeared before us fully veiled. The Appellant's counsel stated she was satisfied as to the witness's identity. The witness stated that the photograph appearing in ……. the Appellant's bundle was her photograph."

   [Our emphasis]

   According to the Determination, AE adopted her witness statement. In cross examination she testified, *inter alia*, that she is the sister of the Appellant, she does not know either of their ages and is unaware of their dates of birth. Prior to marriage, she had been known as "M" and, upon wedding, she adopted the name "AE". She could not describe precisely the place of her alleged marriage to JE in Afghanistan.

5. The FtT refers to the evidence of AE in paragraph [27] of its Determination, in the following terms:

> "In support of the assertion that A and M are one and the same person, we heard evidence from a female witness M. She appeared before us fully veiled, but asserted that she was the person whose photograph appears in [a visa document] ….
>
> Her evidence is that she is also the person appearing in the Marriage Certificate….
>
> We did not see the original of either document, but, <u>because the witness was veiled, we cannot make any judgment as to whether either of those photographs bear [sic] any resemblance to the person in front of us</u>."
>
> [Emphasis added]

In paragraph [28] the FtT makes the following finding:

> "We find that the Appellant has not proved, even to the lower standard, that the witness A is one and the same person as his younger sister. As to the circumstances of the wedding between A and JE the evidence is so unsatisfactory that we can only conclude that whilst the Appellant and JE are known to either other, as to who participated in that wedding we are unable to say."

The FtT proceeded to reject the Appellant's asylum, human rights and humanitarian protection claims, dismissing his appeal in its entirety.

<u>THE MAIN ISSUE: THE NIQAB ATTIRED WITNESS</u>

6. The cornerstone of the Appellant's case has consistently been that he is a person at risk as a result of the marriage of his older sister in Afghanistan. The evidence of the veiled, female person claiming to be this sister was, self evidently, of substantial importance to his case. However, the Determination contains no considered assessment of the evidence of this witness who, as recorded above, was attired in the Niqab, the Muslim veil which enshrouds almost the entirety of the wearer's face. In particular, there is no evaluation of its reliability or credibility. Nor is it possible to make any confident inference about this matter. Thus her evidence was neither believed nor disbelieved by the FtT. The absence of a finding about her credibility is stark. The same observation applies to the evidence of JE. While the FtT made clear adverse credibility findings in relation to the Appellant, it failed to make any such findings as regards AE and JE, who were important witnesses. Furthermore, the FtT engaged in an exercise of attempting to compare AE's veiled *visage* with two photographic images. We consider that there are combined elements of insufficient findings and inadequate reasoning in paragraphs [25] – [28] of the Determination, which contain key passages assembled under the heading "Our Reasons and Decision". These failings *per se* vitiate the Determination of the FtT.

7. Next, we turn to consider the fairness of the hearing conducted by the FtT. In doing so, we would highlight that, before this Tribunal, the following matters were confirmed on behalf of the Secretary of State:

   (a) At the hearing, the FtT did not express any concern about the veiled attire of the witness. In particular, there was no hint that this presentation might influence the FtT's assessment of the evidence of this witness and its ensuing findings.

   (b) The FtT made no enquiries of the Appellant's counsel or the witness about the issue of attire.

   (c) In particular, no attempt was made to establish whether the witness might testify without her veil. Nor was any consideration given to the adoption of a mechanism such as the witness removing her veil, partially or fully, in appropriate conditions, or permitting her to be screened in some way or receiving her evidence before a limited audience.

8. We consider that the failures adumbrated immediately above rendered the hearing before the FtT procedurally unfair. It is clear from paragraph [27] of the Determination that the veiled attire of an important witness became a source of concern for the Tribunal. The substance of this concern is understandable: the FtT found it difficult to evaluate certain photographic evidence on account of her veiled attire. This, in turn, had a bearing on the Tribunal's evaluation of other evidence, in particular a marriage certificate. We consider that it was incumbent on the FtT, in the interests of fairness, to ventilate this concern, with due sensitivity and tact, in the presence of the parties. However, this did not occur. Secondly, we consider that the dictates of a procedurally fair hearing required the FtT to make sensitive enquiries about whether the witness could testify without the veil or partially veiled. No such enquiry was made. Thirdly, we are of the opinion that fairness required the FtT to give consideration to the acceptability and viability of a mechanism such as simple screening or limiting the courtroom audience. No consideration was given to this kind of device. We conclude that these failures rendered the hearing procedurally unfair.

9. We acknowledge the argument advanced on behalf of the Secretary of State that, viewing the Determination as a whole, these procedural irregularities are insufficient to give rise to a successful appeal as they made no real difference to the outcome. In rejecting this argument, we refer particularly to the decision of the Divisional Court in R – v – Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344 and, in particular, the principle enshrined therein that a reviewing or appellate court should exercise caution in concluding that the outcome of the first instance hearing under scrutiny was unaffected by the relevant diagnosed procedural irregularity or impropriety. Simon Brown J stated, at page 13B/D:

> "It is sufficient if an Applicant can establish that there is a real, as opposed to a purely minimal, possibility that the outcome would have been different."

As the judgment of Bingham LJ makes clear, the test is whether the first instance decision might have been different if the irregularity concerned had been avoided: see page 16. Bingham LJ continued:

> "While cases may no doubt arise in which it can properly be said that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would emphasise these cases to be of great rarity**.**"
>
> [Emphasis added.]

We would add that the relevant passages in the judgment of Bingham LJ repay full reading. Furthermore, as the Upper Tribunal has held recently in MM (unfairness; *E & R*) Sudan [2014] UKUT 00105 (IAC), the principles to be distilled from the decision in Cotton (and in other comparable decisions of superior courts) apply as fully to appeals to the Upper Tribunal under section 11 of the Tribunals, Courts and Enforcement Act 2007 as to applications for judicial review.

10. The subject of veiled attire featured in interim advice to judges promulgated by the President of the Asylum and Immigration Tribunal, Hodge J, on 9th November 2006. The specific focus of this guidance was the wearing of a veil by a party's representative. The President stated:

> "Immigration Judges must exercise discretion on a case by case basis where a representative wishes to wear a veil. The representative in the recent case has appeared veiled previously at AIT hearings without difficulties. It is important to be sensitive in such cases. The presumption is that if a representative before an AIT wishes to wear a veil, has the agreement of his or her client and can be heard reasonably clearly by all parties to the proceedings, then the representative should be allowed to do so."

The President added the following:

> "If a Judge or other party to the proceedings is unable to hear the representative clearly, then the interests of justice are not served and other arrangements will need to be made. Such arrangements will vary from case to case, subject to judicial discretion and the interests of all parties."

The sentiments expressed in this latter passage are clearly capable of extending to veiled parties and witnesses.

11. At the same time, the Lord Chief Justice of England and Wales decided to seek advice from the Equal Treatment Advisory Committee of the Judicial Studies Board ("*the JSB").* This culminated in the publication of new guidance on the wearing of the Niqab, the full veil worn by Muslim women,

on 24th April 2007. Summarising the guidance, the Chairman of the Committee, Mrs Justice Cox, stated:

> "At the heart of our guidance is the principle that each situation should be considered individually in order to find the best solution in each case. We respect the right for Muslim women to choose to wear the Niqab as part of their religious beliefs, although the interests of justice remain paramount**.** If a person's face is almost fully covered a Judge may have to consider if any steps are required to ensure effective participation and a fair hearing – both for the woman wearing a Niqab and for other parties in the proceedings. This is not an issue that lends itself to a prescriptive approach – we have drawn on a wealth of cases that demonstrate that and we have drawn up guidance for different court personnel and parties."

Notably, the impetus for the guidance promulgated by Hodge J and the ensuing JSB guidance was a hearing in the AIT which gave rise to an adjournment as the Judge stated he was unable to hear a veiled advocate clearly. The JSB guidance emphasises that where witnesses and parties are concerned:

- A sensitive request to remove a veil may be appropriate. However, this requires careful reflection, since attending court can be a daunting experience for many and the ability of a witness or party to give their best evidence should not be compromised.

- Experience demonstrates that evidence can be given effectively without removing one's veil.

- Where the issue is raised, a short adjournment may be appropriate to enable the woman concerned to reflect and, perhaps, to seek guidance or advice.

- Ideally, any issue of this kind should be addressed at the outset of the hearing.

The latter recommendation clearly places some responsibility on legal representatives.

The guidance repays full reading and we would urge all Judges of both Tiers to study it.

12. The subject of religiously motivated attire and the display of religious symbols has received much attention during recent years. This is at least partly due to the advent of the Human Rights Act 1998, effective from 2nd October 2000 and, by this means, the importation into domestic United Kingdom law of Article 9 of the European Convention on Human Rights and Fundamental Freedoms ("*the Convention*"). Article 9 protects religious freedom in the following terms:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

This is not an absolute right, by virtue of Article 9(2):

> "Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others."

This particular freedom had already been recognised in the Universal Declaration of Human Rights two years previously, in Article 18:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

The simple exercise of juxtaposing these two provisions exposes clearly the genesis of Article 9 of the Convention. Less than two decades later, this freedom was expressed in more expansive and prescriptive terms in Article 18 of the International Covenant on Civil and Political Rights, another measure of the United Nations. This contained the new provision that States Parties should have respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. Later, the right of a child to freedom of thought, conscience and religion was specifically recognised in Article 14 of the United Nations Convention on the Rights of the Child (1989).

13. Thus the particular right, or freedom, which manifested itself in the unpretentious setting of the FtT in Newport, Wales, on 12 August 2013 is one of unmistakable international stature and pedigree. It was the subject of moderate publicity approximately one year ago, on 15th January 2013, when the European Court of Human Rights pronounced judgment in the cases of Eweida and Others – v – United Kingdom (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10). In one of these cases, the Court awarded €2,000 to an air hostess who had been required by her employer not to display a religious cross, ruling that this was a disproportionate measure in pursuit of the employer's legitimate aim of having and enforcing a uniform policy. In one of the other cases, the employer's legitimate aim prevailed, the Court dismissing a similar claim brought by a nurse against a hospital authority. Article 9 of the Convention has also been considered by the House of Lords. In R (Begum) – v – Head Teacher and Governors of Denbigh High School [2006] UKHL 15, their Lordships held that a school's refusal to allow a pupil to wear a Jilbab at school did not interfere with her right to manifest her religion. It was further held, in the alternative, that any interference was objectively

justified under Article 9(2). Subsequently, the High Court held that a school's refusal to permit a pupil to wear a purity ring as an expression of her Christian faith and affirmation of her belief in celibacy before marriage did not infringe Articles 9 and 14 of the Convention: see R (Playfoot) – v – Millis School Governing Body [2007] EWHC 1698 (Admin).

14. The intense public interest and debate which this subject has generated is reflected in certain recent happenings in a nearby fellow EU Member State, France, where, in 2011, legislation was enacted banning the wearing in public of most face coverings. This was declared a criminal offence, attracting fines of up to €150 euros. France is home to the largest Muslim minority in Western Europe, accounting for some five million people, almost 8% of its population, most emanating from its former North African colonies. The controversial French law has been challenged by an application to the European Court of Human Rights by a young Muslim woman residing in France. The debate in that country intensified further as a result of the Paris Appeals Court deciding that a private nursery school had been justified in dismissing an assistant director who refused to remove her Islamic head scarf at work, overturning a decision of the High Court. The hearing in Strasbourg was conducted on 27th November 2013 and judgment is awaited with interest.

15. The ruling made by Mrs Justice Macur in SL –v– MJ [2006] EWHC 3743 (Fam) demonstrates that practical and proportionate solutions lie within the hands of courts and tribunals. The issue arose in a nullity suit, in which the Petitioner, a practising Muslim, appeared in court wearing a full face veil. Her concern was that she should not exhibit her face in the presence of any male person. The only such person in court was her counsel. The solution devised by the judge, with the Petitioner's agreement, was that she would remove her veil screened from the view of her counsel. Her Ladyship stated:

> "[16] In those circumstances, although these proceedings have been in open Court, a careful supervision of entrance into the Court has ensured that any male entering within the doors has been stopped before he approached that part of the Court whereby he would have the opportunity to observe the Petitioner and [her Counsel] has been screened from the Petitioner's view by means of a large umbrella."

The immediately succeeding passage is of some importance:

> "The ability to observe a witness's demeanour and deportment during the giving of evidence is important and, in my view, essential to assess accuracy and credibility. It is a matter of extreme importance that witnesses in such sensitive cases as this should be permitted to present their case to the satisfaction of the Court but also observing their religious observance of dress."

Her Ladyship added the following cautionary words:

> "[17] Each case must obviously be looked at in its own circumstances and the Court must be alert to any opportunistic attempt to derail proceedings listed with all expectation of conclusion …."

16. Most recently, in a case which attracted some publicity, a ruling was made in the Crown Court relating to a Muslim woman, who was the Defendant, attired in the Niqab. The charge was one of witness intimidation and the proceedings were conducted at Blackfriars Crown Court. The issue raised by the presiding judge was the importance of the court being satisfied that the person in the dock was the Defendant. Having received adversarial argument, the Judge, in a careful reserved decision, ruled as follows:

    (a) The Defendant must comply with all directions given by the court to enable her to be properly identified at all stages of the proceedings.

    (b) The Defendant would be at liberty to wear the Niqab throughout the trial, except when giving evidence.

    (c) The Defendant would give evidence from behind a screen shielding her from public view but visible to the presiding judge, the jury and counsel.

    (d) No drawing, sketch or other image of any kind of the Defendant would be permitted while her face was uncovered and the dissemination or external publication of any such image would be prohibited.

    See R –v– D (R) [2013] EWCC (unreported, 17th September 2013).

17. As Judge Murphy recognised correctly in R –v– D, the issues, the factors and the solutions will vary from one court and tribunal to another. One of the principles common to every judicial forum is the long established principle of open justice. This principle is engaged in circumstances where facial religious attire arises as an issue demanding of a solution. The screening of a party or witness or the imposition of restrictions on the courtroom audience are both measures which impinge on this principle. Where a court or tribunal is contemplating a derogation from this principle, it will be guided by two landmark decisions of the House of Lords and, in particular, the related principle that derogation is permissible in furtherance of the protection of the administration of justice. See Scott –v– Scott [1913] AC 417 and Attorney General –v– The Leveller Magazine [1979] AC 440, where Lord Scarman stated:

> "To justify an order for hearing in camera, it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made."

And per Lord Diplock:

> "However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or

> circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest ….
>
> Where a Court in the exercise of its inherent power to control the conduct of proceedings before it, departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the Court reasonably believes it to be necessary in order to serve the ends of justice**.**"
>
> [Emphasis added.]

In the modern era, complexity and sophistication are added to the exercise which courts and tribunals must perform in appropriate cases by virtue of the Human Rights Act 1998 and, in particular, the duty imposed on the court by section 6 not to act incompatibly with any of the protected Convention rights.

18. The approach of courts and tribunals to issues of the present kind may also be viewed through the prism of Article 6 of the Convention, where engaged, which recognises explicitly the permissibility of some encroachment on a fully public hearing "to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice". In its jurisprudence, the Strasbourg Court has recognised the scope for the unequivocal waiver by a party to one or more of its rights under Article 6(1): see, for example, Pauger –v– Austria [1997] 25 EHRR 105, paragraph [58].

19. Finally, returning to the specific context of hearings conducted by the FtT and the Upper Tribunal, we are satisfied that there are ample powers to give directions to deal with and resolve issues of the kind discussed above. We refer particularly to rule 45 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

20. In an increasingly multi-ethnic and culturally diverse society, we would emphasise that issues concerning attire and symbols motivated by religious belief and conviction must be handled by all judicial bodies with great tact and sensitivity. This will serve the twin goals of promoting fairness and avoiding insult or offence. The exercise to be carried out will not infrequently involve the striking of delicate balances. Tribunals should be considerate and respectful in their approach. They should also be resourceful and imaginative in their quest to explore and discover solutions. Simple measures such as limited screening or minimising the courtroom audience – which could extend to briefly excluding the Appellant, with consent – should be considered. Evidence by video link, while another possible compromise, should not be adopted as a solution without first considering all relevant practicalities and the factor of delay. Tribunals should be particularly careful to point out, in cases where it is appropriate to do so, that the maintenance of attire of this kind might

impair the panel's ability to evaluate the reliability and credibility of the evidence of the party or witness concerned and could, in consequence, have adverse consequences for the Appellant. Where issues of this kind arise, a Tribunal's experience, expertise, common sense, pragmatism and sense of fairness will be invaluable tools.

THE OTHER GROUND OF APPEAL

21. Finally, we refer briefly to the remaining ground of appeal, which is that the FtT erred in law in treating the Appellant's claims as having been finally determined in the 2009 appellate proceedings (noted above). This ground of appeal recites that since there had been a challenge to the AIT's determination of July 2009 before the Court of Appeal, with an ensuing remittal to first instance, the conventional approach declared in Secretary of State for the Home Department –v– D (Tamil) [2002] UKIAT 00702 was not necessarily applicable. At the hearing, this Tribunal explored this issue with some care and, as a result, received certain further documentary evidence from the Secretary of State, which was admitted under rule 15(2A). This established to our satisfaction that there had been no remittal by the Court of Appeal to the AIT. Rather, the Appellant withdrew his appeal, as documented in the "CID" record of 1st November 2011. This ground of appeal has no merit accordingly.

DECISION

22. For the reasons elaborated above, we conclude that the decision of the FtT involved the making of material errors of law. As announced at the conclusion of the hearing conducted on 19th December 2013, therefore, we allow the appeal to the extent that the decision of the FtT is set aside and the appeal is remitted to be determined afresh by a differently constituted FtT, with no findings of fact preserved.

THE HON. MR JUSTICE McCLOSKEY,
PRESIDENT OF THE UPPER TRIBUNAL,
ASYLUM AND IMMIGRATION CHAMBER

Dated: 15 January 2014