Upper Tribunal
(Immigration and Asylum Chamber)
DA/00644/2013

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 October 2013	**On 29 November 2013**

Before

THE PRESIDENT, MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE KING
UPPER TRIBUNAL JUDGE KEBEDE

Between

JACOB MAHAHIL ABDI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Spurling (of counsel), instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

[1] By its determination promulgated on 18 June 2013 the First-tier Tribunal dismissed the appeal of the Appellant against the Respondent's decision to deport him from the United Kingdom. The appellant appeals to this Tribunal with permission.

[2] There are two permitted grounds of appeal. The first [per the judge granting permission] is that it is at least arguable that the Tribunal may have erred in law in its assessment of whether the hearing should be

adjourned in the light of the Appellant's non-appearance. The background to the first ground of appeal is that the Appellant was not present at the hearing before the First-tier Tribunal. This was linked, one can say uncontroversially, in one way or another to his conduct. The conduct in question unfolded in the context of the arrangements to escort him as a detained person to the premises of the court. The first ground of appeal resolves to the contention that by proceeding in the absence of the Appellant, the First-tier Tribunal committed the error of law of depriving him of a fair hearing.

[3] We consider that there is substance in this ground. While it has, potentially, a series of different elements, it suffices to highlight and concentrate on one. Paragraph [11] of the determination records that counsel for the Appellant addressed the Tribunal on the question of adjournment. A specific application for an adjournment was formulated. A number of reasons were advanced. One was to obtain disclosure of the notes from the persons described as the escorts. The second was to allow the Appellant to lodge a supplemental witness statement giving his version of what had happened. In the course of this submission, counsel also contended that the hearing could proceed in his absence on the basis of submissions i.e. without evidence, only if the Respondent were to concede that the Appellant's credibility was not in issue and accept that his evidence that he was kidnapped and robbed in 2008 as claimed.

[4] The response on behalf of the respondent was, according to the First-tier Tribunal's determination, the following. The Presenting Officer stated that the Respondent had "…*clarified in the refusal letter what the position is with respect to the 2008 incident*…", and he had nothing further to say regarding the adjournment request. It is uncontroversial that the detailed letter of decision did not address one way or another, the credibility of the various claims and assertions made by the Appellant. There is a striking absence from that very detailed letter of anything approaching either rejection or acceptance of the Appellant's story, whether in whole or in part. The letter, properly analysed, was neutral on this key issue.

[5] It is abundantly clear from the text of the Determination that the Appellant's credibility featured prominently in the hearing which following and, in due course, it became the subject of adverse findings by the First-tier Tribunal. In our judgment, the error of law which materialised has its origins in the acceptance by the Tribunal of the submission made on behalf of the Respondent regarding the decision letter which, as we have highlighted above, was plainly erroneous. The ensuing unfairness to the Appellant is manifested in paragraph [29] of the Determination, where the Tribunal says:

> *"We are of the view on reading the refusal letter as a whole that the Respondent did not accept the Appellant's story about what happened to him."*

Thus, the hearing and ensuing decision consisted of, in part, an assessment of the Appellant's credibility and findings manifestly adverse to him, in circumstances where he had been deprived of the opportunity to respond and to put his case in the context of the cross-examination which, we consider, would inevitably have unfolded had he been present [properly conceded by the Respondent's representative before us]. This was compounded by an erroneous construction of the decision letter.

[6] The Tribunal made an assessment that there would be no injustice to the Appellant in refusing the application to adjourn. They made that assessment, by implication, in their recitation of the relevant procedural Rule. However, we are of the opinion that they provided the wrong answer to the question which they posed. Furthermore, they erred in principle, in our judgment. Their ruling and ensuing conduct of the hearing denied the Appellant his right to a fair hearing, contrary to the fundamental common law right enjoyed by him. This exercise had significant adverse consequences for him. See **R v Thames Valley Police, ex parte Cotton** [1990] WL 753309 and in particular the six precepts of Bingham LJ [at p 17 of the internet version].

[7] The test to be applied by this appellate court is whether the outcome might have been different if an adjournment had been granted. We consider that the answer to this question, applying the correct legal test, must be affirmative. In addition to the above, at a purely prosaic level an adjournment would have given the Appellant the opportunity to counter, and correct, the significantly negative impression which the Tribunal must, realistically, have formed of him. This is reinforced by the new evidence regarding the 'incident' which we have admitted in evidence today. We note the submission on behalf of the Respondent today that justice might better have been served by acceding to the Appellant's application for an adjournment. We acknowledge the correctness and the propriety of that submission on behalf of the Respondent. For these reasons the first ground of appeal succeeds.

[8] The second permitted ground of appeal is articulated in the grant of permission in the following way:

> *"It is also arguable that the panel may have erred in the way that it approached the guidance in **AMM** in relation to safety on return".*

It is common case that the decision in **AMM and others (conflict; humanitarian crisis**; **returness; FGM) Somalia CG** [2011] required the First-tier Tribunal to
enquire into the issue of the Appellant's vulnerability on—in the event of returning to Somalia. The vulnerability equation had a number of ingredients. We do not propose to detail those for present purposes. It is agreed by the parties that there were several.

[9] On behalf of the Respondent, it is acknowledged, we consider correctly, that there was, particularly within paragraphs [31] and [32] of the Determination, a failure to deal adequately with the obligatory issue of vulnerability. While this might be explicable by reference to the formulation of the Appellant's skeleton argument, it is nonetheless an error which cannot be overlooked. This constitutes, in our view, an error of law, which cannot be dismissed as trivial or inconsequential. We would merely add to our determination of the second ground of appeal that, had it been necessary to do so, we might also have found substance in the free-standing argument that in the Determination there is no clearly conducted exercise of grappling with the substantial volume of country evidence assembled by the Appellant and explaining, at least briefly, the Tribunal's assessment and evaluation thereof. This, in turn, gave rise, arguably, to a further error of law infecting the judgment, namely a failure to provide adequate reasons for preferring one part of the country evidence before the Tribunal to the competing other parts. It is not necessary, however, for us to make any concluded determination of this discrete issue. For the reasons we have articulated, the second ground of appeal succeeds also.

[10] We would merely add that if the criterion for evaluation of the First-tier Tribunal's determination of the adjournment request were that of reasonableness then it would clearly pass muster. What the Tribunal did was perfectly reasonable and entirely understandable in the circumstances, having regard to the evidence available to it at the time. Moreover, the Tribunal approached its task with demonstrable care. However, the relevant criterion is that of fair hearing and, for the reasons which we have articulated, we consider that the Tribunal's approach had the effect of depriving the Appellant of a fair hearing.

Decision and Disposal

[11] Accordingly, we set aside the Determination of the First-tier Tribunal. Given our finding that there was an unfair hearing and, secondly, the intimation to this court that the Respondent would wish to adduce further evidence on certain issues and, thirdly, having regard to the terms of the letter dated 22 October 2013 from the Appellant's solicitors, we are of the clear opinion that the appropriate course is not to proceed to remaking in this forum, with or without an adjournment. We remit the matter to a differently-constituted First-tier Tribunal. We decline to give any further instructions or directions at this stage as that is a matter belonging pre-eminently to the forum of the First-tier Tribunal.

Signed: Edward McCloskey.

Date: 25 October 2013

Mr Justice McCloskey
President, Upper Tribunal