Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02300/2015**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 31 July 2017	**On 8 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

TADIOS MEHARI GEDEY
(NO ANONYMITY DIRECTION)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Adams (counsel) instructed by Halliday Reeves Law Firm
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Fox promulgated on 18 January 2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 13/05/1991. The appellant says he is a national of Eritrea. On 17/10/2015 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Fox ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 06/04/2017 Judge Nightingale gave permission to appeal stating

> 2. The grounds argue that the judge erred by interrupting submissions on behalf of the appellant and ending the hearing before these were completed. It is also argued that the judge erred in consideration of aspects of the expert report.
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> 3. In view of the allegation made, it is arguable that the judge erred in the procedure followed at the appeal hearing. Evidence of the events at the hearing must be provided and a statement from Ms Cleghorn (counsel) filed and served forthwith.
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> 4. Whilst of less immediately identifiable arguable merit, permission is also granted regarding the judge's consideration of the expert evidence. Permission is granted on all grounds pleaded.

The hearing

5. (a) Miss Adams, for the appellant, referred me to the witness statement of Ms Cleghorn, counsel who appeared before the First-tier tribunal. In her witness statement, Ms Cleghorn says that she started making submissions and had only spoken for approximately 2 minutes when the Judge interrupted her. She says that the Judge spoke to her harshly, raising his voice and adopting an angry tone.

(b) Ms Adams told me that there were two parts to the grounds of appeal. The first is a procedural issue. She told me that the Judge interrupted Ms Cleghorn and prevented her from making full submissions. By the time there was an exchange between the Judge and Ms Cleghorn, the respondent had already made complete and uninterrupted submissions. She told me that the fact that the respondent was able to make submissions, but counsel for the appellant was not, raised the question of fairness, or at least perceived unfairness. She relied on the case of ML Nigeria v SSHD [2013] EWCA Civ 844.

(c) Ms Adams told me that the appearance that submissions for the appellant will not be considered effects the Judge's consideration of the evidence in the case and in particular of an expert report. She told me that the Judge had left the bench before counsel for the appellant had the opportunity to make submissions in relation to the expert report. She took me to [23] of the decision, and told me that the Judge's summary of the content of a 70 page expert report is inadequate. She then referred me to various passages in the expert report which, she said, supported the appellant's claim but was not considered by the Judge.

(d) Ms Adams told me that the appellant had been deprived of a fair hearing. She urged me to allow the appeal and to remit this case to the first-tier.

6. Mr Diwnycz, for the respondent, relied on the rule 24 note dated 26 April 2017. He told me that he did not challenge anything said in Ms Cleghorn's statement. He read an extract from the Home Office presenting officer's report, which indicated that counsel for the appellant was repeatedly interrupted by the Judge. He described a sequence of interruptions as "*some discussions of a heated nature*".

Analysis

7. In Elayi (fair hearing - appearance) [2016] UKUT 508 (IAC) it was held that justice must not only be done but must manifestly be seen to be done. The appeal was allowed when the Judge had engaged in a private conversation relating to the Appellant's case with the Appellant's representative in the absence of the other party's representative, in the precincts of the court room but partly out of sight and earshot of the Appellant and his spouse, in a setting other than that of bench/bar before the Appellant's hearing began: the contents whereof, other than a question about the Appellant's religious adherence, itself an improper enquiry made in this fashion, were not divulged to the Appellant.

8. On 16 February 2016 directions were issued in this case requiring both the appellant and respondent to lodge a paginated and indexed bundle of all the documents to be relied on at appeal, with a schedule identifying the essential passages. The hearing scheduled for 16 September 2016 was adjourned on the appellant's application. The appeal hearing took place on 17 January 2017.

9. The appellant's first bundle was tendered on 7 September 2016. It contained a chronology, a skeleton argument, documentary evidence and 375 pages of background materials and caselaw.

10. The appellant's second bundle of documents was lodged on 11 January 2017. That bundle contains the appellant's witness statement, a supporting letter, and a 68 page report prepared by Gunter Schroder. The appellant's representatives did not produce a schedule identifying essential passages.

11. Despite the procedural history, the number of documents lodged and the directions dated 16 February 2016, the appellant's representatives did not produce a schedule identifying essential passages. Is not entirely surprising that when counsel's attention turned to the significant volume of documentary evidence the Judge wanted to know why directions had not been followed. Although Ms Cleghorn emphasises the manner and tone she was spoken to by the Judge, I make nothing of that. The Judge has not had the opportunity to comment either on the grounds of appeal or the content of Ms Cleghorn's witness statement, which despite the terms of the grant of permission to appeal on 6 April 2017 (*evidence of the events at the hearing must be provided and a statement from Ms Cleghorn (counsel) filed and served forthwith*) was not produced until 27 July 2017, and was not signed and dated until the morning of this hearing.

12. What is important is the impression that was created when the Judge interrupted counsel. As I have already indicated, the Judge was correct to ask counsel why directions had not been followed. There is nothing wrong with the Judge mentioning an error in preparation. In Singh [2016] EWCA Civ 492 it was held that a Judge did not act amiss if, in relation to some feature of a party's case which struck him as inherently improbable, he indicated the need for unusually compelling evidence to persuade him of the fact. Such statements could positively assist the advocate or litigant in knowing where particular efforts might need to be pointed. There was no need to bar robust expression by a Judge so long as it was not indicative of a closed mind. Such expressions might be positively necessary to displace a presumption or misapprehension which was potentially highly material to the case. There could be no objection to the FtT Judge stating, at an early stage, that he disagreed with the argument that documentary evidence was of lesser importance in these kinds of appeal. That was a perfectly proper view for the Judge to hold and it was entirely appropriate for him so to say, with a view to avoiding any misapprehensions on the part of counsel in thereafter conducting the appeal to the Claimant's best advantage.

13. However, a potential difficulty is created when one party is given the benefit of making full submissions, and another party is prevented from making submissions. The correct course may well have been to adjourn whilst an essential passages index was created and then resume to hear full submissions, or at least to invite written submissions within a short time period. The appearance of treating parties' agents differently, allowing the respondent's presenting officer to speak at length, but bringing counsel for the appellant to an abrupt halt, creates the impression that one representative is treated more favourably than the other.

14. Before me, parties' agents agree that Ms Cleghorn was not able to make submissions concerning the expert report relied on by the appellant. Because the Judge cut those submissions short and because no written submissions were made, the impression may be created in a reasonable mind that the Judge has not given full consideration to the expert report.

15. Grounds of appeal focus on procedural impropriety. Although a challenge is taken to [23] of the decision. no other part of the Judge's findings are the subject of criticism. Were it not for an error in procedure, the decision would stand. But justice must not only be done it must be seen to be done. In CD (DRC) v Secretary of State for the Home Department [2011] EWCA Civ 1425 the Judge had made comments when allowing permission to appeal and then went on to determine the second stage of the appeal. The Court of Appeal said that the test of bias was whether all the circumstances of the case would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased: Porter v McGill [2001] UKHL 67 applied.

16. In this case the record of proceedings discloses that the respondent's representative completed her submissions. Counsel for the appellant was not able to complete hers. On that basis, I find that the appellant must be left with the impression that he had not had a fair and complete hearing. I must therefore set the decision aside.

Remittal to First-Tier Tribunal

17. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

18. In this case I have determined that the case should be remitted because the impression might be created that the appellant's hearing was incomplete. A new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

19. I remit the matter to the First-tier Tribunal sitting at North Shields to be heard before any First-tier Judge other than Judge Fox.

Decision

20. The decision of the First-tier Tribunal is tainted by material errors of law.

21. I set aside the Judge's decision promulgated on 18 January 2017. The appellant's appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 4 August 2017

Deputy Upper Tribunal Judge Doyle