Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/15383/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 November 2014	**On 14 November 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr ABDULLAH SALAD AHMED

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Hirst, Counsel (instructed by Wilson Solicitors LLP)
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge TRP Hollingworth on 1 October 2014

against the determination of First-tier Tribunal Judge Davey who had dismissed the Respondent's appeal in a determination promulgated on 5 August 2014.

2. The Appellant is a national of Somalia, resident in Kenya, born on 2 February 1981. He had applied to enter the United Kingdom as the spouse of a person with refugee status in the United Kingdom. His application had been refused under paragraphs 320(3) and 352A of the Immigration Rules. The Entry Clearance Officer, Nairobi had not been satisfied as to the Appellant's identity. That was the central issue in the appeal. The judge found that the Appellant had failed to establish his identity on the balance of probabilities.

3. Permission to appeal to the Upper Tribunal was granted because it was considered arguable that the judge, having intimated at the conclusion of the hearing on 16 June 2014 that he would allow the appeal, had not in the event done so when his determination was promulgated.

4. Standard directions were made, providing that the appeal would be reheard immediately in the Upper Tribunal in the event that a material error of law were found.

5. The Respondent filed a rule 24 notice indicating that the appeal was opposed. The Appellant filed a bundle of documents which included witness statements from the counsel who had appeared at the hearing, his instructing solicitor and the sponsor.

Submissions – error of law

6. Ms Hirst for the Appellant relied on the application for permission to appeal and grant of permission to appeal. There had been a breach of procedural fairness. The judge should have indicated that he had changed his mind about the appeal and given the parties the opportunity to address him: R (Bashir) v Special Adjudicator [2002] Immigration AR 1 and SK (Sri Lanka) [2008] EWCA Civ 495. The hearing would have appeared unfair to a fair-minded observer. Great distress had been caused to the Appellant and sponsor as the supporting witness statements showed.

7. The tribunal indicated that neither the determination nor the judge's record of proceedings suggested any intention

to allow the appeal. A copy of the record of proceedings was given to both representatives and time was allowed for it to be read. The judge's comments on the record of proceedings had not been sought. The tribunal declined to seek them at this late stage, particularly because they were immaterial. Clearly the parties were under the impression that the judge had said something which made them expect that he would allow the appeal. Ms Sreeraman produced the Home Office Presenting Officer's note from the hearing which was to the same effect. Thus the judge's own views could take the matter no further.

8. Ms Sreeraman for the Respondent submitted that there had been no procedural error leading to unfairness. The judge's indication had not been binding.

9. Ms Hirst submitted in any event that the determination was flawed and inadequately reasoned. The judge's findings were perverse in that he had gone out of his way to reject evidence which he had accepted at the hearing. The reason why there had been no statement from the husband, i.e., the Appellant, had been provided to the judge. The judge had not sufficiently explained why he rejected the sponsor's evidence. The conclusions he had reached were not reasonable. Nor was it fair that the United Kingdom had not recognised its obligation to facilitate the resettlement of families of refugees. The delay in the decision making process was unfair in itself.

No material error of law finding

10. The tribunal stated at the conclusion of submissions that it found that there was no material error of law and reserved its determination which now follows.

11. The evidence before the tribunal plainly shows that, somehow, Judge Davey created the impression at the end of the First-tier Tribunal hearing that he would be allowing the appeal. The Home Office Presenting Officer's typed note dated 16 June 2014 records that the judge had said that the appeal "will be allowed", which indicates a future intention. The Appellant's counsel's witness statement dated 28 August 2014 is to the same effect: "During my submissions the judge used words to the effect that although it was a finely balanced case, he was going to allow the appeal." That is obviously different from a direct

statement by the judge that the appeal *was* allowed then and there.

12. The record of proceedings made by the judge, however, has no note to any such effect. The note merely indicates that his determination was reserved. The record of proceedings shows a fully contested hearing. While no doubt individual practice may vary, in the tribunal's experience the usual practice in the First-tier Tribunal is to note on the record of proceedings that an appeal has been allowed if a judge has decided he or she is able to make that commitment. It is also significant, in the tribunal's view, that the determination states that it was prepared within two days of the hearing, when it is reasonable to expect that the judge had a clear recollection of any commitment about the outcome of the appeal which he had made, and would also have been aware of whether he needed further assistance from the parties for any reason. The approved determination was signed just over a month after the hearing.

13. As was accepted by both advocates, under the Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended) which applied to the appeal, the promulgation of the determination was the point at which the First-tier Tribunal's decision became binding: see SK (Sri Lanka) (above) at [21]. Moreover, there was no suggestion that Judge Davey had intended to give an oral determination at the end of the hearing. On the contrary, his record of proceedings states that his determination was reserved.

14. By way of contrast, under The Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014 SI 2604, in force from 20 October 2014, oral decisions can be given by First-tier Tribunal judges and any such decision be effective at the point of pronouncement.

15. The result in the tribunal's view is unfortunate and perhaps even embarrassing, but it does not amount on the facts of the present appeal to procedural error leading to unfairness, let alone actual injustice to the Appellant and his sponsor. The result was a disappointment for the parties whose hopes had been inadvertently raised. The Respondent had refused to concede the appeal, which was contested. The Appellant had not sought an adjournment for any reason, and the judge's ultimate

conclusions were based on the evidence which had been submitted. Even if the judge changed his mind over "a finely balanced case" (and, as already stated, the tribunal accepts that the judge created the impression that he intended to allow the appeal), his remarks suggesting that the appeal would be allowed were made at the end of the contested hearing. He had not cut short evidence or submissions because he had already reached a decision, at least at the time of the hearing.

16. The hearing itself had been fairly conducted. There was no allegation to the contrary in the grounds of onwards appeal or in any of the witness statements. At [5] of his determination the judge records that he raised the matter of the absence of evidence from the Appellant during that hearing and had not received a satisfactory response. The judge was not bound to accept the explanation offered on the Appellant's behalf.

17. In the tribunal's view there is nothing in the determination to support the submission that the judge went out of his way to reject the Appellant's evidence. Rather there was a careful and neutral evaluation of the evidence, against the country background accepted by the Entry Clearance Officer that obtaining documentary evidence from Somalia could be difficult. The judge described that as "perhaps unsurprising", signalling his awareness of the circumstances. But at [3] of his determination he drew attention to the absence of evidence from Kenya. The judge explained why he was unable to give weight to such evidence as was produced, in particular that of a witness who admitted that she had not seen the Appellant prior to or in the course of a wedding ceremony in 2007, some seven years ago.

18. The judge's description of the sponsor's evidence as "clear and unequivocal" did not amount to acceptance that the Appellant's identity as her husband had been proved to the required standard, either by her evidence or other means. He noted that the sponsor's evidence had not been supported by equivalent evidence from the Appellant, although it was asserted that the sponsor was in regular contact with him. At [19], the judge left open the possibility that further evidence might be obtained which would resolve the identity issue in the Appellant's favour, which would obviously be for a future entry clearance application. That surely underlines the judge's

open minded approach to the appeal. So far as the tribunal understands, that suggestion has since been adopted in that the Appellant now has a Somali passport, issued on 20 August 2014.

19. The obligation of the United Kingdom to facilitate family reunion for refugees is met by the provisions of paragraphs 352A onwards of the Immigration Rules. The delay in the processing of entry clearance applications is ultimately a matter for the government. The First-tier Tribunal has no general supervisory powers.

20. The tribunal finds that the judge's findings and decision were open to him. There was no material error of law in the determination and there is no basis for interfering with the judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed **Dated**

Deputy Upper Tribunal Judge Manuell **12 November 2014**