



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/00037/2011

THE IMMIGRATION ACTS

Heard at Manchester

**Determination
Promulgated**

On 11 July 2013

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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

SADIKOU DJINA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nicholson, Bury Law Centre

For the Respondent: Mrs Pettersen, a Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant, Sadikou Djina, was born on 11 February 1976 and is a citizen of Benin. By a decision dated 1 December 2010, the respondent refused the appellant asylum and decided to remove him from the United Kingdom as an illegal entrant. The appellant appealed against that

decision to the First-tier Tribunal (Judge Khawar) which, in a determination which is dated 16 February 2011, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. On 22 April 2013, I gave directions for evidence to be filed by Mrs Hindmarch, the respondent's Presenting Officer at the hearing before the First-tier Tribunal and also for Mrs Hindmarch and Mr Rodney Ison (the appellant's former McKenzie friend before the First-tier Tribunal) to attend and give evidence. Their presence was required before the Upper Tribunal in order to determine the question of an error of law because the grounds assert that the appellant did not receive a fair hearing before the First-tier Tribunal on account of the fact that his McKenzie friend, Mr Ison, had been compelled to sit behind, rather than next to him, in court and had been unable to offer assistance and advice as a consequence. Mrs Hindmarch spoke briefly to the Tribunal. She explained that she was unable to remember anything about the circumstances at the hearing before the First-tier Tribunal.
3. I then heard briefly from the appellant himself who spoke in French with the assistance of an interpreter. The appellant denied that he had been able to speak with Mr Ison before he was required to make submissions to the First-tier Tribunal Judge. An application for an adjournment made by the appellant had been refused by the First-tier Tribunal Judge. I note from the determination [9] that the appellant complained that he had not received the respondent's bundle before the hearing. It transpired the appellant then claimed that he had not received a paginated bundle; the judge noted that the appellant had responded to the refusal letter in his own witness statement of January 2011. The application for the adjournment is recorded in the determination as is the judge's refusal of the application.
4. The appellant agreed that he had been invited by the judge to make any comments following the submissions made by Mrs Hindmarch but he repeated that he had been unable to obtain any advice or assistance from Mr Ison who was sitting several feet behind him at the back of the court at the direction of the judge.
5. I heard evidence from Mr Ison. Mr Ison said that the judge had not invited the appellant to speak following Mrs Hindmarch's submission. Mr Ison confirmed that he had not been given any opportunity to assist or advise the appellant during the course of the hearing and, in particular, before the appellant made his own oral submissions.
6. It is not clear to me why the judge insisted that Mr Ison, the appellant's McKenzie friend, should sit at the back of the court behind the appellant; there is certainly no suggestion that Mr Ison had been required to do so on account of any misbehaviour or other irregularity in discharging his duties as McKenzie friend. Over the years significant jurisprudence has accrued relating to the involvement of McKenzie friends in Tribunal and court proceedings. It is established that a McKenzie friend can help an appellant

or litigant with case papers and give quiet advice on points of law or procedure or issues that the litigant may wish to raise in the court. He or she may also discuss questions which a litigant may wish to ask of a witness during cross-examination. It appears to me to be clear that such duties may only be properly discharged by a McKenzie friend if he or she is sitting adjacent to the litigant; sitting some distance from the litigant and in particular behind him or her at the back of the court imposes an impediment upon the legitimate involvement of the McKenzie friend in the proceedings which should not, in my opinion, be imposed if the litigant is to enjoy a fair hearing. I do not say that the appellant in this instance could not have insisted to the judge that he be allowed to turn and speak with Mr Ison or that Judge Khawar would have denied him that opportunity. However, I accept that the appellant felt constrained from involving Mr Ison simply because he was not sitting close enough to him to engage in quiet and easy conversation during the course of the hearing. In the circumstances, I am satisfied that the appellant genuinely believes that he was not given a fair hearing although in reaching that finding I fully acknowledge that there is no evidence whatsoever that the judge consciously chose to act unfairly. It is proper for the Tribunal to err on the side of caution in considering issues such as this and it is for that reason that I set aside the determination of the First-tier Tribunal, preserving none of the findings of fact. The appellant should be given the opportunity of appearing again before the First-tier Tribunal when he may either present his own case, engage the services of a professional representative or, if he wishes, ask a McKenzie friend, including Mr Ison, to assist him.

DECISION

7. The First-tier Tribunal erred in law such that its determination falls to be set aside. The appeal is remitted to the First-tier Tribunal (not Judge Khawar) for that Tribunal to remake the decision.

Signed

Date 15 July 2013

Upper Tribunal Judge Clive Lane